Missouri Attorney General's Opinions - 1986

Opinion	Date	Topic	Summary
1-86	Dec 3		Opinion letter to Dick D. Moore
2-86	Jan 6	BONDS. GENERAL OBLIGATION BONDS. INTEREST. POLITICAL SUBDIVISIONS. STATE AUDITOR.	The sentence, "The sale shall be a public sale unless the issuing jurisdiction adopts a resolution setting forth clear justification why the sale should be a private sale except that private activity bonds may be sold either at public or private sale.", in Section 108.170.1 of House Committee Substitute for Senate Bill No. 140, Eighty-Third General Assembly, First Regular Session, applies only to the sales of bonds of housing authorities created under Section 99.040, RSMo.
5-86	Feb 4		Opinion letter to Honorable Anthony D. Ribaudo
6-86	Jan 17		Opinion letter to Arthur L. Mallory, Ph.D.
7-86	Jan 17		Opinion letter to The Honorable James R. Strong
8-86	Mar 12		Opinion letter to Major-General Charles M. Kiefner
9-86	Jan 17		Opinion letter to The Honorable Jan Martinette
10-86	Mar 28		Opinion letter to The Honorable Dennis Smith
14-86	Mar 12		Opinion letter to The Honorable Marvin E. Proffer
16-86	Feb 21		Opinion letter to Michael L. Midyett
18-86	Mar 12		Opinion letter to The Honorable Mike Lybyer
19-86	Feb 11		Opinion letter to The Honorable Roy Blunt
20-86	Mar 12		Opinion letter to The Honorable Weldon W. Perry, Jr.
21-86	Apr 11		Opinion letter to The Honorable James R. Strong
23-86	Apr 25		Opinion letter to Charles E. Kruse
24-86	Apr 28		Opinion letter to Richard Rice
25-86	Apr 28		Opinion letter to The Honorable Douglas Harpool
27-86			Withdrawn
28-86	Apr 28	CONTRACTS. COOPERATIVE AGREEMENTS. COUNTIES.	Counties may cooperate with each other to jointly purchase metal culverts, connecting bands and grader blades, which are to be used for the individual needs of such counties; counties may solicit bids for their combined purchasing requirements of metal culverts, connecting bands and grader blades and purchase from the lowest and best bidder without individually inviting bids and comparing the bids from the

			individual invitation to those received from the combined bidding process; and, a combined competitive bidding procedure which allows the participating counties to decide what to invite bids on in regard to their own individual needs and allows them to accept or reject the bids received does not involve the improper delegation of the counties' executive duties.
30-86	June 24		Opinion letter to The Honorable Karen McCarthy
32-86	Mar 31		Opinion letter to The Honorable Lester Patterson
34-86	Mar 31		Opinion letter to The Honorable John T. Russell
41-86	Mar 10		Opinion letter to The Honorable Chris Kelly
42-86	Apr 1		Opinion letter to Weldon W. Perry, Jr.
43-86	Mar 20		Opinion letter to The Honorable Roy D. Blunt
44-86	Mar 20		Opinion letter to The Honorable Roy D. Blunt
45-86	Sept 10		Opinion letter to The Honorable Edwin L. Dirck
48-86	Apr 1		Opinion letter to The Honorable Rex R. Wyrick
49-86	Apr 28		Opinion letter to The Honorable Donald McQuitty
52-86			Withdrawn
54-86	Apr 1		Opinion letter to The Honorable Roy D. Blunt
55-86	Apr 1		Opinion letter to The Honorable Roy D. Blunt
59-86	Apr 28		Opinion letter to The Honorable James R. Strong
62-86	Apr 3		Opinion letter to John A. Pelzer
63-86	Apr 28		Opinion letter to John A. Pelzer
64-86	Apr 25		Opinion letter to Albert A. Riederer
66-86	July 30	COUNTY HEALTH CENTERS. POLITICAL SUBDIVISIONS. THIRD CLASS CITIES. TAXATION-PROPERTY. TAXATION-RATE. TAX RATE ROLLBACK.	The political subdivisions and taxing authorities in question may impose property tax rates up to the maximums discussed herein.
69-86	Apr 25		Opinion letter to Douglas Abele
72-86	June 4		Opinion letter to The Honorable Mark A. Youngdahl

74-86	July 28		Opinion letter to Charles E. Kruse
77-86			Withdrawn
78-86	July 28		Opinion letter to The Honorable Patrick J. Hickey
82-86	Aug 19	BANKS. SECRETARY OF STATE. SECURITIES.	(1) Section 362.105.1(13), as enacted by House Bill No. 1207, Eighty-Third General Assembly, Second Regular Session, requires the licensing and registration of bank personnel engaged in selling shares of mutual funds established and maintained by the bank; (2) Section 362.105.1(13), as enacted by House Bill No. 1207, Eighty-Third General Assembly, Second Regular Session, requires banks which establish one or more mutual funds and offer to sell shares of such mutual funds to register as a broker-dealer with the office of the Commissioner of Securities, to consent to supervision and inspection by that office, and to subject themselves to the continuing jurisdiction of the Commissioner of Securities; and (3) Section 362.105.1(13), as enacted by House Bill No. 1207, Eighty-Third General Assembly, Second Regular Session, does not affect the ability of the Commissioner of Securities to enforce his interpretation of Chapter 409, RSMo, requiring bank sales personnel who engage in activities other than ministerial duties in connection with the purchase and sale of investment securities to be registered as agents of a registered broker-dealer.
87-86	Sept 4		Opinion letter to Joseph J. O'Hara
88-86	June 24		Opinion letter to Mary-Jean Hackwood
89-86	Aug 19	CITIES, TOWNS AND VILLAGES. LIQUOR CONTROL. OBSCENE PUBLICATIONS. PORNOGRAPHY.	Section 573.080, RSMo Supp. 1984, (1) does not preempt a municipality from enacting an ordinance regulating the location of adult-oriented bookstores, movie houses, and other businesses which deal in explicit sexual material by means of zoning regulations, (2) preempts a municipality from enacting an ordinance regulating the display of explicit sexual material and material depicting nudity, including bare female breasts, when such material is displayed within the premises of a business establishment in such a fashion as to be visible to minors who enter into the premises, but such material is not otherwise visible from a street, highway, or public sidewalk, or from the property of others, except to the extent such ordinance is in accordance with the provisions of Section 573.040, RSMo 1978, (3) preempts a municipality from enacting an ordinance automatically revoking or suspending the business license of, or leading to the refusal to issue a business license to, one who has been convicted of a state-

			law violation under Chapter 573, RSMo, (4) does not preempt a municipality from enacting an ordinance regulating alcoholic beverages which has as an effect the regulation of nude dancing by performers, and (5) preempts a municipality from enacting an ordinance regulating the public display of explicit sexual material by means of adopting in its entirety the language of Section 573.010(2), RSMo Supp. 1985, defining the term "displays publicly" and by adding thereto the additional language, "or from any portion of the person's store, or the exhibitor's store or property when items and merchandise other than this material are offered for sale to the public".
91-86	Jan 17		Opinion letter to Carl M. Koupal, Jr.
92-86			Withdrawn
93-86	Aug 21	GOLF CARTS. MOTOR VEHICLES.	Golf carts do not have to be registered under Section 301.020, as enacted by House Committee Substitute for House Bills Nos. 1367 and 1573, Eighty-Third General Assembly, Second Regular Session.
98-86	Sept 12	DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION. SCHOOL FOUNDATION LAW. SCHOOLS. TAX RATE ROLLBACK.	"Tax rates levied" for purposes of the School Aid Formula are the school district's tax rates prior to the annual Proposition C tax rate adjustment.
104-86	Sept 2	SOIL AND WATER CONSERVATION DISTRICTS AND SUBDISTRICTS. TAXATION-GENERAL. PROPERTY TAX.	Tax revenues derived from subsection 2 of Section 278.250, RSMo 1978, may be used to acquire real and personal property and rights-of-way if the sole purpose in acquiring such is for the construction of present or future works of improvement otherwise authorized by the language of the statute.
108-86	Sept 2	COUNTY CLERK. COUNTY TREASURER.	A deputy county clerk is eligible to be county treasurer under Section 54.040, RSMo 1978, if the deputy county clerk resigns his or her position as deputy prior to the general election.
111-86	Sept 2	COUNTIES. TAXATION-GENERAL. TAXATION-PROPERTY. TAXATION-TAX RATE.	A deputy county clerk is eligible to be county treasurer under Section 54.040, RSMo 1978, if the deputy county clerk resigns his or her position as deputy prior to the general election.
112-86	Oct 20	DRIVING WHILE INTOXICATED. JURISDICTION. JUVENILES.	A sixteen- year-old juvenile arrested for a first offense of driving while intoxicated (Section 577.010, RSMo Supp. 1984) is not within the exclusive original jurisdiction of the juvenile court because a first offense of driving while intoxicated is a state traffic ordinance or

		TRAFFIC OFFENSES.	regulation, the violation of which does not constitute a felony.
115-86	Oct 20	APPOINTIVE OFFICERS. ECONOMIC DEVELOPMENT, DEPARTMENT OF. PROFESSIONAL REGISTRATION, DIVISION OF. STATE OFFICERS. TERMS OF OFFICE.	The positions of public members on licensing boards within the Division of Professional Registration continue in existence and the terms for public members appointed to such boards are as set forth in the specific enabling statutes for each board. Those members appointed as public members serve in that capacity until their successors are appointed.
118-86	Sept 29		Opinion letter to The Honorable John Scott
121-86	Dec 3		Opinion letter to Carl M. Koupal, Jr.
122-86	Nov 14		Opinion letter to James R. Moody
124-86			Withdrawn
125-86	Dec 3	ECONOMIC DEVELOPMENT, DEPARTMENT OF. PROFESSIONAL REGISTRATION, DIVISION OF ACCOUNTANTS.	The Missouri State Board of Accountancy is authorized to commence a positive enforcement program, including the requirement that a licensee submit with the annual registration application samples of financial reports prepared by the licensee.
126-86	Nov 14		Opinion letter to John Jacobs
129-86	Dec 3	COUNTIES. COUNTY CLASSIFICATION.	Saline County will remain a second class county on January 1, 1987.
133-86	Dec 11	BALLOTS. CONSTITUTIONAL LAW. FIRE PROTECTION DISTRICTS. HANCOCK AMENDMENT. TAXATION-TAX RATE.	1. The initial levy of 30 cents per $100 of assessed valuation for a fire protection district must be submitted to the voters as required by Article X, Section 22, of the Missouri Constitution, the Hancock Amendment. 2. The levy question may be submitted to the voters on the same ballot as the incorporation of the fire protection district and the election of the first board of directors. 3. The ballot proposition for the levy may be set forth in general terms such as: Shall the board of directors of the _____ fire protection district be authorized to levy a tax rate of not more than 30 cents per $100 assessed valuation to provide funds for the support of

			the district?

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December 3, 1986

OPINION LETTER NO. 1-86

Dick D. Moore, Director
Department of Corrections and
Human Resources
2729 Plaza Drive
Jefferson City, Missouri 65101

FILED
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Dear Mr. Moore:

This letter is in response to a question posed by your predecessor in office asking:

> 1. Is it permissible, as we believe, for a sentencing judge, who has suspended the imposition of a defendant's sentence and given the defendant 5 years probation, to, at the end of the first probation term, assess a sentence but suspend the execution of that sentence and assess a second 5 year probation term?
>
> 2. Can a sentencing judge suspend the execution of a sentence, give a 5 year probation, and again suspend execution and give a second 5 year probation?
>
> 3. If your answer to 1 and 2 is "No", should the Board of Probation and Parole refuse to obey a court order to supervise the probationer when it appears that the defendant was given a term of probation beyond the judge's power?

(Emphasis in original.)

In addition, your office has asked us to expand upon the third question by dealing with the following two situations:

Dick D. Moore, Director

Situation No. 1. If a defendant is found guilty after trial or enters a guilty plea to multiple counts of sodomy pursuant to a plea agreement and a judgment is entered by the trial court that the sentences are to be served concurrently, under Section 558.026.1, RSMo Supp. 1984 (which requires consecutive sentencing in this instance), see Adams v. State, 688 S.W.2d 401, 402-403 (Mo. App., E.D. 1985); State v. Toney, 680 S.W.2d 268, 273-274 (Mo. App. E.D. 1984), should the Missouri Department of Corrections and Human Resources (hereinafter sometimes referred to as "Department") ignore the word "concurrently" in the judgment and treat the defendant as being sentenced to consecutive sentences or should the Department refer the matter back to the appropriate court through the appropriate pleadings?

Situation No. 2. A sentencing judge sentences an individual to serve one (1) year in county jail, and after this individual has served a certain amount of time, for example, seven (7) months, the sentencing judge places the individual on parole for two (2) years. After the individual has successfully served his parole for more than five (5) months but prior to the successful completion of two (2) years on parole, the sentencing judge revokes the individual's parole and sentences the individual to serve five (5) months at one of the department's facilities. Under State ex rel. Woodmansee v. Appelquist, 687 S.W.2d 176 (Mo. banc 1985), the sentencing judge is required to credit the individual with time served on parole. Therefore, the individual's sentence of one (1) year was completed after five (5) months on parole, and the order of incarceration directed at the Department is a nullity. Should the Department ignore this order or refer the matter back to the appropriate court through the appropriate pleadings?

I.

Questions 1 and 2

Your first and second questions deal with the authority of a sentencing judge to extend a period of probation or to assess a second period of probation after imposing an initial period of probation.

Section 549.071, RSMo 1978,[1] conferred on the courts the right to "extend the term of the probation but no more than one extension of any probation may be ordered." Section 549.071 was repealed by the passage of House Bill No. 1196, 1982 Mo. Laws 435. Section 559.016.1(1) empowers the courts to assess probation on a defendant for a "term of years not less than one year and not to exceed five years for a felony". Section

559.021.4, as enacted by House Bill No. 1607, Eighty-Third General Assembly, Second Regular Session, states that "[t]he court may modify or enlarge the conditions of probation at any time prior to the expiration or termination of the probation term." We have found no judicial interpretation of the courts' ability to enlarge the conditions of probation; our determination is that Chapter 559, RSMo, is devoid of any language empowering the courts to extend the term of a defendant's probation as previously allowed under repealed Section 549.071.

It is a well-recognized maxim of legislative construction that the action of a legislative body in amending, repealing, or re-enacting a statute or ordinance is presumed to have some substantive effect, so that it will not be found to be a meaningless act of housekeeping. Wolfner v. Board of Adjustment of the City of Frontenac, 672 S.W.2d 147, 151 (Mo. App., E.D. 1984). In giving the Legislature's repeal of Section 549.071 substantive effect, we conclude that the courts of this state no longer have the power to extend a term of probation.

The difference between Questions 1 and 2 is that in the first question imposition of sentence has been suspended when probation is first imposed, while in the second question execution of the sentence is suspended when probation is first imposed and the second period of probation is clearly an extension of the first such period of probation. Because a suspended imposition of sentence is not a "sentence" in the technical sense, State v. Lynch, 679 S.W.2d 858, 860 (Mo. banc 1984), in the first situation there is no extension of a period of probation; there are two periods of probation imposed: one attributable to the suspended imposition of sentence and one attributable to the suspended execution of sentence. See Section 557.011.2(3) and (4). Therefore, the answer to the first question is "yes", and the answer to the second question is "no".

II.

Question 3
and Additional Situations Nos. 1 and 2

The above-referenced items concern the authority of the Department to correct an erroneous sentence.

Generally, the inclusion of any unlawful and ineffective provision in a judgment is surplusage and will be disregarded by another court. State v. Campbell, 307 S.W.2d 486, 490 (Mo. 1957), cert. denied, 356 U.S. 922 (1958). Missouri courts have held that the Department has the right to ignore an

erroneous statement in a judgment or sentence stating when the sentence will commence. Harkins v. Lauf, 532 S.W.2d 459, 461 (Mo. banc 1976); State v. Trevino, 428 S.W.2d 552, 554 (Mo. 1968).

In Ossana v. State, 699 S.W.2d 72, 73 (Mo. App., E.D. 1985), the court had this to say about Situation No. 1 (incorrect sex offense sentences):

> We now consider the trial court's jurisdiction to resentence movant. In a criminal prosecution, the trial court loses jurisdiction to alter a final judgment and sentence after it has been rendered. State ex rel. Wagner v. Ruddy, 582 S.W.2d 692, 695 (Mo. banc 1979). In order to constitute a final judgment, it is axiomatic that the sentence not be contrary to law. Since the original sentences in this case did not comply with the statute, the trial court did not exhaust its jurisdiction until it rendered sentences in accordance with the law.

Thus, it appears that one can proceed in either of two ways in these situations. First, the Department could choose to ignore the erroneous statement in the judgment under the Trevino line of decisions. Second, the Department can file a motion to modify the judgment in the sentencing court, because the sentencing judge still has jurisdiction to enter a judgment in accordance with the law under Ossana.

Your third question presents a situation where the Department is to decide whether it will provide probation services under Section 217.750.2, RSMo Supp. 1984, to someone who should not be on probation. If the Department ignores the language imposing probation in the erroneous judgment, the defendant would be free and unsupervised. This may be contrary to the intent of the sentencing court. Therefore, we recommend that a motion to modify the judgment be filed under the reasoning in Ossana.

The first additional situation presents the Department with a sentence imposed by the court (the concurrent sentence) that is not as long as the consecutive sentence that is legally required. Especially if the concurrent sentence is based on a plea bargain or if the defendant chooses not to appeal his concurrent sentences due to the risk that the appellate court would lengthen his sentences by making them consecutive, State

v. Blockton, 703 S.W.2d 500, 507 (Mo. App., E.D. 1986); State v. Shaw, 701 S.W.2d 514, 517-518 (Mo. App., E.D. 1986), it would appear appropriate to file a motion to modify the judgment with the sentencing court under Ossana. See State v. McClanahan, 418 S.W.2d 71, 74 (Mo. 1967); but see Neighbors v. State, 496 S.W.2d 807 (Mo. 1973); Hand v. State, 447 S.W.2d 529 (Mo. 1969).

The second additional situation presents the Department with the incarceration of an individual who should not be incarcerated. In this situation, the Department might have to keep this individual incarcerated for a period of time -- weeks or months -- if it chose to file a motion to modify the judgment with the sentencing court. In this instance, it may be preferable to go ahead and release the individual rather than wait to hear from the sentencing court. This may also prevent the filing of claims against the Department.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

NOTE

1. All statutory references are to RSMo 1978, unless otherwise indicated.

BONDS:
GENERAL OBLIGATION BONDS:
INTEREST:
POLITICAL SUBDIVISIONS:
STATE AUDITOR:

The sentence, "The sale shall be a public sale unless the issuing jurisdiction adopts a resolution setting forth clear justification why the sale should be a private sale except that private activity bonds may be sold either at public or private sale.", in Section 108.170.1 of House Committee Substitute for Senate Bill No. 140, Eighty-Third General Assembly, First Regular Session, applies only to the sales of bonds of housing authorities created under Section 99.040, RSMo.

January 6, 1986

OPINION NO. 2-86

FILED
2

The Honorable Margaret Kelly, CPA
Missouri State Auditor
Truman State Office Building, Eighth Floor
Jefferson City, Missouri 65101

Dear Ms. Kelly:

This opinion is in response to your questions asking:

1) When a political subdivision of the State undertakes to issue general obligation bonds (other than private activity bonds) bearing an interest rate of 9%, must the bonds be sold at a public sale unless a resolution is adopted by the issuing jurisdiction giving clear justification why the sale should be a private sale?

2) When a political subdivision of the State undertakes to issue general obligation bonds (other than private activity bonds) bearing an interest rate of 11%, can the bonds be sold at a private sale if a resolution is adopted by the issuing jurisdiction giving clear justification why the sale should be a private sale?

3) When examining the proceedings relating to a proposed general obligation bond issue wherein the issuing jurisdiction has adopted a resolution giving a justification why the sale of the bonds should be a private sale and the bonds were in fact

sold at a private sale, is the State Auditor to exercise discretion in accepting or rejecting the justification?

Section 108.170 of House Committee Substitute for Senate Bill No. 140, Eighty-Third General Assembly, First Regular Session, states:

> Other provisions of law to the contrary notwithstanding, any and all bonds, notes, or other evidences of indebtedness, including bonds, notes, or other evidences of indebtedness payable solely from revenues derived from any revenue-producing facility, hereafter issued under any law of this state by any county, city, town, village, school district, educational institution, drainage district, levee district, nursing home district, hospital district, library district, road district, fire protection district, water supply district, sewer district, housing authority, land clearance for redevelopment authority, special authority created under section 64.920, RSMo, authority created pursuant to the provisions of chapter 238, RSMo, or other municipality, political subdivision or district of this state shall be negotiable, may be issued in bearer form or registered form with or without coupons to evidence interest payable thereon, may be issued in any denomination, and may bear interest at a rate not exceeding ten percent per annum, and may be sold, at any sale pursuant to any law applicable thereto, at the best price obtainable, not less than ninety-five percent of the par value thereof, anything in any proceedings heretofore had authorizing such bonds, notes, or other evidences of indebtedness, or in any law of this state to the contrary notwithstanding. Such aforementioned bonds, notes, or other evidences of indebtedness may bear interest at a rate not exceeding fourteen percent per annum if sold at public sale after giving reasonable notice of such sale, at the best price obtainable, not less than ninety-five percent of the par value thereof; provided, that such bonds, notes or other evidences of indebtedness may be sold to the federal government at private sale at a rate not exceeding fourteen percent per annum; except that, the sale of bonds, notes, or other evidences of indebtedness issued by the state board of public buildings created under section 8.010, RSMo, the state board of fund commissioners created under section 33.300, RSMo, any port authority created under section 68.010, RSMo, the bi-state metropolitan development district authorized under section 70.370, RSMo, any special business district created under section 71.790, RSMo, any county, as defined in section 108.465, exercising the powers granted by sections 108.450 to 108.470, any land clearance for redevelopment authority created under section 99.330, RSMo, the industrial development board created under section 100.265, RSMo, any planned industrial expansion authority created under section 100.320, RSMo, the higher

education loan authority created under section 173.360, RSMo, the Missouri housing development commission created under section 215.020, RSMo, the state environmental improvement and energy resources authority created under section 260.010, RSMo, the agricultural and small business development authority created under section 348.020, RSMo, any industrial development corporation created under section 349.035, RSMo, or the health and educational facilities authority created under section 360.020, RSMo, shall, with respect to the sales price, manner of sale and interest rate, be governed by the specific sections applicable to each of these entities rather than this section and except that, the sale of bonds, notes or other evidences of indebtedness issued by any housing authority created under section 99.040, RSMo, may be sold at any sale, at the best price obtainable, no less than ninety-five percent of the par value thereof, and may bear interest at a rate not exceeding fourteen percent per annum, any law of this state to the contrary notwithstanding. The sale shall be a public sale unless the issuing jurisdiction adopts a resolution setting forth clear justification why the sale should be a private sale except that private activity bonds may be sold either at public or private sale. Industrial development revenue bonds may be sold at private sale and bear interest at a rate not exceeding fourteen percent per annum if sold pursuant to any law applicable thereto, at the best price obtainable, not less than ninety-five percent of the par value thereof.

2. Other provisions in subsection 1 of this section to the contrary notwithstanding, revenue bonds issued for airport purposes by any constitutional charter city in this state which now has or may hereafter acquire a population of more than four hundred fifty thousand but less than six hundred thousand inhabitants, according to the last federal decennial census, may bear interest at a rate not exceeding fourteen percent per annum if sold at public sale after giving reasonable notice, at the best price obtainable, not less than ninety-five percent of the par value thereof.

Section 108.170 of House Committee Substitute for Senate Bill No. 140 provides at lines 18 to 22 that certain bonds may be sold at "any sale", whether private or public, when the interest rate thereon does not exceed ten percent (10%). Lines 25 to 30 of Section 108.170 of House Committee Substitute for Senate Bill No. 140 provide that certain bonds may bear interest rates not exceeding fourteen percent (14%) per annum if such are sold at public sale after giving reasonable notice of such. Lines 59 to 69 of Section 108.170 of House Committee Substitute for Senate Bill No. 140 provide that the sale of certain bonds must be public unless the issuing jurisdiction adopts a resolution setting forth clear justification why the sale should be a private sale. The first two provisions existed in prior law. See Section 108.170, RSMo

Supp. 1984 (repealed). The latter provision is new to the law with House Committee Substitute for Senate Bill No. 140.

We find that this latter provision introduces some ambiguity as to the interest rates to be applied to bonds. In particular, we find the words "The sale" on line 65 of Section 180.170 of House Committee Substitute for Senate Bill No. 140 to be ambiguous, as this phrase does not identify the bonds to which the rest of the sentence applies. One of the accepted canons to be applied in construing a statute permits and often requires an examination of the historical development of the legislation, and in doing so, resort may be had to the journals of the legislature and the original bill and amendments thereto. State ex rel. Missouri Power & Light Company v. Riley, 546 S.W.2d 792, 797 (Mo.App., K.C. 1977).

House Committee Substitute for Senate Bill No. 140 was enacted in response to Section 621 of the Deficit Reduction Act of 1984, P.L. 98-369, 98 Stat. 494, 915, amending 26 U.S.C. Section 103(n), which requires the allocation of private activity bonds. See Section 2(4) of House Committee Substitute for Senate Bill No. 140 and 26 U.S.C. Section 103(n)(7) as enacted by the Deficit Reduction Action of 1984 (defining the term "private activity bonds").

Senate Bill No. 140, Eighty-Third General Assembly, First Regular Session, as originally introduced, was entitled "AN ACT relating to private activity bonds." This version did not contain any amendments to Section 108.170, RSMo. The original version of the bill was read the first time in the Senate on Wednesday, January 9, 1985. 1985 Senate Journal, Eighty-Third General Assembly, First Regular Session (hereinafter sometimes referred to as "Senate Journal") 51. Senate Bill No. 140 was read a second time in the Senate on Wednesday, January 16, 1985, and referred to the Urban Affairs and Industrial Development Committee. 1985 Senate Journal 188. On Thursday, March 7, 1985, the Committee on Urban Affairs and Industrial Development reported that it had considered the bill and recommended that the bill do pass. 1985 Senate Journal 482.

On Thursday, April 4, 1985, Senate Bill No. 140 was taken up for perfection. 1985 Senate Journal 700. At that time, Senate Amendment No. 1 to Senate Bill No. 140, was adopted. 1985 Senate Journal 700-703. In part, this amendment changed the title from "AN ACT relating to private activity bonds." to "AN ACT to repeal section 108.170, RSMo Supp. 1984, relating to certain bond issues, and to enact in lieu thereof twelve new sections relating to the same subject." 1985 Senate Journal 701. This amendment also deleted housing authorities from the list of political subdivisions whose bonds are governed by the specific statutes applicable to them with respect to the sales price,

manner of sale, and interest rate of their bonds, and added the following language:

> and except that, the sale of bonds, notes or other evidences of indebtedness issued by any housing authority created under section 99.040, RSMo, may be sold at any sale, public or private, at the best price obtainable, not less than ninety-five percent of the par value thereof, and may bear interest at a rate not exceeding fourteen percent per annum, any law in this state to the contrary notwithstanding.

1985 Senate Journal 702-703. This amendment was apparently aimed at the implied repeal of provisions of Section 99.150.1 and .2, RSMo Supp. 1984, which, with certain exceptions not relevant here, authorizes housing authorities to sell their bonds at any rate of interest as the authorizing resolution may require at public sale held after notice published once at least five days prior to such sale in a newspaper having general circulation in the area of operation and in a financial newspaper published in Kansas City or in the City of St. Louis.

On Tuesday, April 9, 1985, Senate Bill No. 140, as amended by Senate Amendment No. 1, was reported perfected. 1985 Senate Journal 711. On Thursday, April 11, 1985, Senate Bill No. 140, as amended by Senate Amendment No. 1, was read the third time in the Senate and passed. 1985 Senate Journal 742-743.

On Thursday, April 11, 1985, Senate Bill No. 140, as amended by Senate Amendment No. 1, was reported to the House of Representatives and read the first time. 1985 House Journal, Eighty-Third General Assembly, First Regular Session (hereinafter sometimes referred to as "House Journal") 874. On Monday, April 15, 1985, Senate Bill No. 140, as amended by Senate Amendment No. 1, was read in the House for the second time. 1985 House Journal 889. On Wednesday, April 17, 1985, Senate Bill No. 140, as amended by Senate Amendment No. 1, was referred to the Budget Committee. 1985 House Journal 983.

On Wednesday, May 29, 1985, the Budget Committee reported its recommendation that the House Committee Substitute for Senate Bill No. 140 do pass. 1985 House Journal 1619.

House Committee Substitute for Senate Bill No. 140 substituted the following language for that quoted supra:

> except that, the sale of bonds, notes or other evidences of indebtedness issued by any housing authority created under

> section 99.040, RSMo, may be sold at any sale, at the best price attainable, not less than ninety-five percent of the par value thereof, and may bear interest at a rate not exceeding fourteen percent per annum, any law of this state to the contrary notwithstanding. The sale shall be a public sale unless the issuing jurisdiction adopts a resolution setting forth clear justification why the sale should be a private sale.

(Emphasis added.)

The words "The sale" are ambiguous, because: (1) in the preceding phrase House Committee Substitute for Senate Bill No. 140 authorizes housing authorities to sell their bonds at "any sale" as a direct response to Section 99.150, RSMo Supp. 1984 (which requires most housing authority bond sales to be public)[1]; and (2) the sentence in question refers to the "issuing jurisdiction". From the legislative history and context of this language, we interpret the words "The sale" as being intended by the drafters of the House Committee Substitute to refer only to the sale of bonds by housing authorities; the principal subject of these amendments being whether the bonds of housing authorities are to be sold at private or public sale.

On Thursday, June 13, 1985, House Committee Substitute for Senate Bill No. 140 was taken up and House Amendment No. 1 was offered, which added the following language to that quoted above:

> except that private activity bonds may be sold either at public or private sale.

1985 House Journal 2157. House Amendment No. 1 to House Committee Substitute for Senate Bill No. 140 was adopted, and the House Committee Substitute, as amended was read the third time and passed. 1985 House Journal 2157-2159.[2]

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[1] House Committee Substitute for Senate Bill No. 140 deletes the words "public or private" that followed the words "any sale" in Senate Amendment No. 1 to Senate Bill No. 140.

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[2] House Committee Substitute for Senate Bill No. 140, as amended by House Amendment No. 1, was reported to the Senate on Thursday, June 13, 1985. 1985 Senate Journal 1838-1839. On Friday, June 14, 1985, House Committee Substitute for Senate Bill No. 140, as amended by House Amendment No. 1, was adopted, read the third time, and passed by the Senate. 1985

House Amendment No. 1 raises additional confusion, because it refers to "private activity bonds". The term "private activity bonds" is defined in Section 2(4) of House Committee Substitute for Senate Bill No. 140 as "certain industrial development bonds and student loan bonds designated as such by federal law pursuant to P.L. 98-369." "Private activity bond" is defined in Section 621 of the Deficit Reduction Act of 1984, P.L. 98-369, 98 Stat. 494, 916, amending 26 U.S.C. Section 103(n)(7), generally as a federally tax-exempt bond that is either an industrial development bond or a student loan bond. The term "industrial development bond" is defined in 26 U.S.C. Section 103(b)(2) and (3) to exclude obligations used to carry on a trade or business by a governmental unit. Thus, bonds used to finance projects run by a housing authority would not generally be industrial development bonds. In addition, 26 U.S.C. Section 103(n)(7)(B), as enacted by the Deficit Reduction Act of 1984, defines the term "private activity bond" to exclude certain multi-family residential housing. It is also unlikely that housing authorities would be involved with student loan bonds. See 26 U.S.C. Section 103(n)(8), as enacted by the Deficit Reduction Act of 1984 (defining the term "student loan bond"). Thus, it can be seen that housing authorities would not generally be involved with the issuance of private activity bonds. This brings into question whether the words "The sale" in Section 108.170.1 of House Committee Substitute for Senate Bill No. 140 refer only to housing authorities or to all bond sales generally. If the latter interpretation is adopted, there would be a conflict between the provision of Section 108.170.1 of House Committee Substitute for Senate Bill No. 140 allowing the private sale of certain bonds at interest rates not exceeding ten percent (10%) per annum and the language requiring a public sale absent a resolution stating "clear justification" why the bonds should be sold at a private sale. There would also be a conflict between the provision in Section 108.170.1 of House Committee Substitute for Senate Bill No. 140 requiring the public sale of certain bonds with interest rates exceeding ten percent (10%) per annum but not exceeding fourteen percent (14%) per annum and the provision allowing the private sale of such bonds upon a showing of "clear justification".

Footnote continued ...

Senate Journal 1879-1880. On Friday, June 21, 1985, House Committee Substitute for Senate Bill No. 140, as amended by House Amendment No. 1, was signed by the President Pro Tem of the Senate. 1985 Senate Journal 2094-2095. On this same date, House Committee Substitute for Senate Bill No. 140, as amended by House Amendment No. 1, was signed by the Speaker of the House, 1985 House Journal 2518, and delivered to the Governor, 1985 Senate Journal 2095. On July 31, 1985, this legislation was approved by the Governor.

The ultimate guide in the construction of statutes is the intent of the General Assembly. Edwards v. St. Louis County, 429 S.W.2d 718, 722 (Mo. banc 1968). Statutes that appear to conflict should be read together, if at all possible, so that they may stand together. Id., at 721. If the statutes cannot be reconciled, the last act of the General Assembly prevails. State ex rel. Atkinson v. Planned Industrial Expansion Authority of St. Louis, 517 S.W.2d 36, 49 (Mo. banc 1975). From the context of this language and its legislative history, we believe it is possible to harmonize the provisions of Section 108.170.1 of House Committee Substitute for Senate Bill No. 140. The words "The sale" in the language in question refer only to the sales of bonds by housing authorities.

Accordingly, the answer to the first question asking whether general obligation bonds of a political subdivision bearing interest at a rate of nine percent (9%) must be sold at public sale unless a resolution is adopted by the issuing jurisdiction giving clear justification why the sale should be a private sale is "no". The language of Section 108.170.1 of House Committee Substitute for Senate Bill No. 140 referred to in the question (lines 65-69) is not applicable to political subdivisions generally, but is only applicable to housing authorities.

The answer to the second question asking whether general obligation bonds of a political subdivision bearing interest at a rate of eleven percent (11%) per annum can be sold at a private sale if a resolution is adopted by the issuing jurisdiction giving clear justification why the sale should be a private sale is "no" for the same reason given in response to the first question.

The third question is moot. Under Section 108.240, RSMo Supp. 1984, the Missouri State Auditor registers only general obligation bonds. The bonds of housing authorities are not general obligation bonds. Section 99.140.4, RSMo 1978. Therefore, the Missouri State Auditor will probably never have occasion to review housing authority resolutions giving a justification why the sale of bonds should be private pursuant to the provisions of Section 108.170.1 of House Committee Substitute for Senate Bill No. 140.

Conclusion

It is the opinion of this office that the sentence, "The sale shall be a public sale unless the issuing jurisdiction adopts a resolution setting forth clear justification why the sale should be a private sale except that private activity bonds may be sold either at public or private sale.", in Section 108.170.1 of House Committee Substitute for Senate Bill No. 140, Eighty-Third General Assembly, First Regular

Session, applies only to the sales of bonds of housing authorities created under Section 99.040, RSMo.

Yours very truly,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

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February 24, 1986

Opinion Letter No. 5-86

Honorable Anthony D. Ribaudo
State Representative, 65th District
5440 Daggett
St. Louis, Missouri 63110

FILED
5

Dear Representative Ribaudo:

This letter is in response to your request for an opinion of this office asking the following questions which we have modified as to form:

> 1. The requirement in § 443.060 RSMo for identification of the evidence of indebtedness (e.g., note) secured with a deed of trust has been deleted by House Bill No. 210 (1985). Is a recorder of deeds allowed to identify such a note after January 1, 1986?
>
> 2. The statutes do not appear to require such a note to be presented to the recorder when the securing instrument is to be released by notation on its margin. Can the recorder require execution and recording of a deed of release of such instrument? If the recorder may not impose such a requirement, should the recorder make some notation of the particulars of a release based only on verbal instruction?
>
> 3. Is a partial deed of release necessary to effectuate a partial release of a deed of trust?

The premise upon which your first question rests deserves independent consideration. A pre-enactment analysis of H.B. No. 210 (1985) by the House Research Staff included in its summary of the bill:

> . . .; and providing, as to security instruments recorded after the effective date of the bill, that the promissory note or other obligation would not have to be presented for identification at the time of recording the security instrument or for cancellation at the time of recording a release. The bill contains an effective date of January 1, 1986. . . . The production of promissory notes and other obligations for identification and cancellation would be eliminated. . . .

Truly agreed to and finally passed H.B. No. 210 (1985)[1] enacted an entirely new section, § 443.035 RSMo, which provides:

> 1. "Security instrument", as that term is used in this section, and in sections 443.060, 443.070, 443.080, 443.090, 443.100, 443.110 and 443.390, shall mean any mortgage, deed of trust or other real property security instrument securing the payment or satisfaction of any debt or other obligation.
>
> 2. Security instruments may be assigned by instrument in writing, acknowledged by the assignor in the manner provided for the acknowledgment of other instruments affecting the title to real property, and may be recorded in the office of the recorder of deeds in the county or counties in which the security instrument being assigned was recorded.
>
> 3. Any person who acquires an interest in or a lien upon real property for value and without notice of an unrecorded assignment of a security instrument recorded on or after January 1, 1986, and who has relied upon a release of such security instrument executed by the party last shown of record to be the owner thereof, shall acquire said interest in or lien upon such real property free from the lien of said security instrument to the same extent as if the release upon which reliance was placed had been executed by the lawful holder of

> the debt or other obligation secured by said security instrument.
>
> 4. From and after January 1, 1986, no recorder of deeds in this state shall accept for record any security instrument or assignment thereof in which the mortgagee, cestui que trust or assignee is named as bearer or the actual identity of the mortgagee, cestui que trust or assignee is otherwise not ascertainable from the face of said security instrument or assignment. All security instruments and assignments thereof presented for record shall contain the mailing address of the mortgagee, cestui que trust or assignee; provided, however, that the omission thereof shall not affect the validity of any security instrument or assignment, or the constructive notice imparted by the record thereof. § 443.035

H.B. No. 210 (1985) repealed §§ 443.040 and .050 which provided for the presentation to the recorder of deeds, simultaneous with the recording of a real estate mortgage or deed of trust, of the evidence(s) of debt (e.g., promissory note) intended to be secured by the mortgage or deed of trust, for the recorder's identification and presumable basis for the recorder's subsequent authentication of the note at the time of release of the mortgage or deed of trust.

H.B. No. 210 (1985) revised existing § 443.060[2] by substituting the defined term "security instrument" (§ 443.035.1) for the numerous uses of the phrase "mortgage or deed of trust" in that statutory section and by modifying subsections 1, 2 and 3 in the following manner:

> 1. . . . In the case of security instruments recorded prior to January 1, 1986, if satisfaction be acknowledged by the payee or assignee, or in case a full deed of release is offered for record, and except as otherwise provided in subsection 3 hereof, the note or notes secured shall be produced and canceled in the presence of the recorder, who shall enter that fact on the margin of the record and attest the same with his official signature; and except as otherwise provided in subsection 3 hereof, no full deed of release of such a security

instrument shall be admitted to record unless the note or notes are so produced and canceled, and that fact entered on the margin of the record and attested as above provided.

2. If such note or notes are required by subsection 1 of this section to be presented for cancellation and are not presented for the alleged reason that they have been lost or destroyed, the recorder, before allowing any entry of satisfaction to be made on the record or any deed of release to be placed on the file or record, shall require the mortgagee or cestui que trust named in the security instrument desired to be released or his legal representative, to make oath, in writing, stating that the note or other evidences of debt named in the security instrument sought to be released have been paid and delivered to the maker or his representative, and the recorder shall also require the maker of such note or notes, or his legal representative, to make affidavit, in writing, that the note or notes in question have been paid, and cannot be produced because lost or destroyed, and that they are not then in the possession of any person having any lawful claim to the same; . . .

3. In case any mortgagee, cestui que trust or assignee, or personal representative[thereof] . . . shall desire to release the property described in any security instrument recorded prior to January 1, 1986, without receiving full satisfaction of the debt, note or obligation thereby secured, he shall be permitted to do so by the recorder on presentation to the recorder of the notes or other obligations evidencing the principal of the debt secured thereby, or accounting for them by affidavits or otherwise as now or hereafter provided by law in the case of full release and the recorder shall note the fact of such full release on the margin of the record of such security instrument or, if such release is made by deed of release, shall note the

> fact of the filing for record of such release, and of the presentation of such notes or other obligations, or accounting therefor, on such notes or obligations . . . [and] on the margin of the record of such security instrument, but shall not cancel such notes or other obligations; . . . § 443.060 (added language underscored)

H.B. No. 210 (1985) similarly revised §§ 443.070, -.080, -.090, and -.100, to wit:

> Every person who shall execute a deed of release of a security instrument recorded prior to January 1, 1986, shall at the time of making and delivering such release deed, make and deliver the affidavit required by section 443.060 unless such deed of release states that the indebtedness remains unpaid in whole or in part; . . . § 443.070 (added language underscored)

> The trustee . . . in any security instrument . . . by a . . . public utility company . . . upon its property . . . may enter satisfaction of said security instrument upon the records where the same has been recorded. Where such security instrument was recorded prior to January 1, 1986, without producing the . . . notes . . . secured by said . . . security instrument, satisfaction shall not be entered . . . unless the trustee . . . and the president . . . of the . . . public utility company . . . shall make and file with the recorder affidavits stating that all of the . . . notes . . . secured by said security instrument have been paid. . . . § 443.080 (added language underscored)

> In case any person desires to release any part of the property described in any security instrument recorded prior to January 1, 1986, by marginal record or deed of release, he shall be permitted to do so by the recorder on presentation to the recorder of the notes or other obligations evidencing the principal of the debt secured there-

> by, or accounting for them by affidavits or otherwise as . . . provided by law in the case of full release, and the recorder shall note the fact of such partial release on the margin of the record of such security instrument or, if such release is made by deed of release, shall note the fact of the filing for record of such partial release, and of the presentation of such notes or other obligations, or accounting therefor, on such notes or obligations . . . and on the margin of the record of such security instrument but shall not cancel such notes or other obligations; . . . § 443.090 (added language underscored)
>
> In cases where a number of notes are named in any security instrument which was recorded prior to January 1, 1986, on payment of any one or more of such notes, the maker thereof may present the same to the recorder, and the recorder shall cancel the same and make a memorandum of such presentation and cancellation on the margin of the record of such security instrument. § 443.100 (added language underscored)

The revision of § 443.110 by H.B. No. 210 (1985) is to simply convert the words or phrase "mortgage or deed of trust" into the term "security instrument."

Lastly, H.B. No. 210 (1985) revises § 443.390 (pertaining to St. Louis City and Kansas City, and to St. Louis, Jackson, St. Charles, Jefferson, Greene, and Clay counties) so as to similarly isolate this section's application to "security instruments" recorded prior to January 1, 1986.

Although the method employed was rather abstruse, we conclude that H.B. No. 210 (1985) prospectively eliminated the procedure whereby the recorder of deeds would identify the subject evidence of indebtedness when a real estate "security instrument" was initially placed of public record so as to be able to authenticate such evidence when the security instrument was subsequently removed (released) of public record. Therefore, in answer to your first question, it is our opinion that for real estate "security instruments" placed of public record on and after January 1, 1986, there is no statutory authorization for the recorder of deeds to identify the evidence of indebtedness to which the "security instrument" may relate.

Your second question is primarily whether written rather than oral releases of real estate "security instruments" may be required by recorders of deeds. As amended by H.B. No. 210 (1985), § 443.060 RSMo provides:

> 1. If any mortgagee, cestui que trust or assignee, or personal representative . . . [thereof] . . ., receive full satisfaction of any security instrument, he shall, at the request and cost of the person making the same, acknowledge satisfaction of the security instrument on the margin of the record thereof, or deliver to such person a sufficient deed of release of the security instrument; . . .
>
> * * *
>
> § 443.060
> (emphasis added)

The law authorizing photographic and similar copying of public records, §§ 109.090 et seq. RSMo, provides:

> * * *
>
> 3. When any recorder of deeds in this state is required or authorized by law to record . . . any . . . written instrument, he may do so by . . . photographic, . . . microfilm, or similar mechanical process which produces a clear, accurate and permanent copy of the original. The reproductions so made may be used as permanent records of the original. . . . In all cases where instruments are recorded under the provisions of this section by microfilm, any release, assignment or other instrument affecting a previously recorded instrument by microfilm may not be made by marginal entry but shall be filed and recorded as a separate instrument and shall be in a separate book, cross-indexed to the document which it affects. § 109.120[3]

Accordingly, it is our opinion that where the recorder of deeds maintains a system of microfilmed land records pursuant to § 109.120, the recorder must require a deed of release before a real estate "security instrument" is removed (released) from

the public record. We also are of the opinion that the "he" referred to in § 443.060 is the mortgagee, not the recorder. Dodson v. Clark, 49 Mo.App. 148 (1892); see Hellweg v. Bush et al., 74 S.W.2d 89 (Mo.App., Spr. 1934).[4] Thus, recorders of deeds not maintaining microfilmed land records under § 109.120 must require the physical presence of the mortgagee or other legally authorized person to execute the acknowledgement of the satisfaction of the debt by marginal entry. The secured party cannot orally (by telephone or in person) instruct the recorder to make a "marginal" release; the marginal entry of the release must be acknowledged in writing by the mortgagee.[5]

Your third question asks if partial releases of security instruments may be made by marginal entry. There apparently are two partial release statutes: §§ 443.090 and 443.110, RSMo Supp. 1985. See also § 443.060.3, RSMo Supp. 1985 (applicable to full releases of partially satisfied debts). Section 443.090, RSMo Supp. 1985, authorizes partial releases by marginal entry but is applicable only to security instruments recorded prior to January 1, 1986. Section 443.110, RSMo Supp. 1985, does not authorize partial releases by marginal entry. Thus, we believe that security instruments recorded after January 1, 1986, may not be partially released by marginal entry, but may be partially released by deed of release in the circumstances described in § 443.110, RSMo.

Sincerely,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

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[1]"AN ACT to repeal sections 59.330, 443.040, 443.050, 443.060, 443.070, 443.080, 443.090, 443.100, 443.110, and 443.390, RSMo 1978, relating to security instruments, and to enact in lieu thereof nine new sections relating to the same subject, with an effective date."

[2]The essential concept of this statute is quite old. See L. Mo. 1835, p. 210. The substantial form of the present statute appears to date from L. Mo. 1887, pp. 224-225. The last repeal and re-enactment of this statute was in H.B. No. 226, 78th G.A. (L.Mo. 1975, pp. 391-396). "AN ACT . . . relating to mortgages and deeds of trust. . . ."

[3]This law authorizing custodians of public records to create duplicate originals appears to have been first enacted in H.B. No. 626, 63rd G.A.; L.Mo 1945, pp. 1427-1428. "AN ACT authorizing the reproduction of any records by photostating, photographing or microphotographing; . . ." The provisions above quoted were added by H.B. No. 142, 72nd G.A.; L.Mo. 1963, pp. 150-158. "AN ACT . . . relating to public records . . . and permitting the reproduction of certain records and the destruction or storage of certain records. . . ."

[4]In Hellweg it is noted:

> . . . On August 29, 1929, based on the affidavits above referred to, the release of the Hellweg mortgage was effected, and on the same day P.J. Hill, as assignee of the beneficiary, executed a marginal release of the Groh mortgage, the original first mortgage, in words and figures as follows: "'I hereby certify that the within described note was produced, fully assigned, and I marked it cancelled on the face.'"
>
> "Witness my hand and seal this 9th day of August, 1929. Calvin E. Henderson, Recorder of Deeds." 74 S.W.2d at 91

This case also reflects the desirability of that aspect of H.B. No. 210 (1985) providing a considerable incentive for the recording of assignments of security instruments.

> . . . We cannot refrain from stating, however, that, if our statute did provide for the recording of assignments of mortgages where the notes secured thereby have been assigned, the possibility of fraudulent releases, such as we now have under consideration, would be most effectively eliminated. . . . 74 S.W.2d at 94

[5]We make no representation as to the weight to be accorded any particular release, and the degree of reliance thereon should be a matter of judgment and discretion on the part of the prospective purchaser of the property.

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ATTORNEY GENERAL

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January 17, 1986

OPINION LETTER NO. 6-86

Arthur L. Mallory, Ph.D.
Commissioner of Education
Missouri Department of Elementary
and Secondary Education
Post Office Box 480
515 East High Street
Jefferson City, Missouri 65102

FILED
6

Dear Dr. Mallory:

This letter is in response to your question asking:

> May a school district in the year subsequent to a tax revision resulting either from reassessment or Section 22A of Article X of the Constitution of Missouri modify its tax rate ceiling by a simple majority vote of the board of education to recapture any loss in state school aid resulting from an aggregate increase in assessed valuation within the district?

(Emphasis added.)

Section 137.073.5(2), RSMo Supp. 1985, states in part:

> It is further the intent of the general assembly, under the authority of section 10(c) of article X of the Constitution of Missouri, that the provisions of this section be applicable to tax rate reductions or revisions mandated under section 22 of article X of the Constitution of Missouri as to reestablishing tax rates as reduced or revised in subsequent years, enforcement provisions, and other provisions not in conflict with section 22 of article X of the Constitution of Missouri; except that, in

> calculating tax rates in the year subsequent to a tax reduction or revision under section 22 of article X of the Constitution of Missouri, a school district may modify its tax rate ceiling in such a manner as to recapture any loss in state school aid occasioned by establishing its tax rate ceiling as required by section 22 of article X of the Constitution of Missouri. * * *

(Emphasis added.)

Under the school foundation formula, as a school district's "equalized assessed valuation", as defined in Section 163.011(5), RSMo Supp. 1985, increases, the amount of state aid it receives under the school foundation formula generally decreases.

Section 163.031.2 and .3, RSMo Supp. 1985, state:

> 2. From the minimum guarantee for each district there shall be deducted an amount derived by multiplying fifty-seven percent of the pupil-weighted levy as adjusted by the district income factor by each one hundred dollars of the equalized assessed valuation of the property in the district the preceding year. Also, there shall be deducted fifty-seven percent of the amount received for school purposes from fines, forfeitures, escheats and intangible taxes.
>
> 3. To the amount calculated in subsections 1 and 2 of this section shall be added an amount to which a district is eligible under the guaranteed-tax-base provision which shall be calculated as follows: Multiply the difference between the guaranteed tax base less the equalized assessed valuation per eligible pupil of the school district for the last year divided by one hundred times the number of eligible pupils, times the difference obtained by subtracting fifty-seven percent of the equalized pupil-weighted levy as adjusted by the district income factor from the equalized operating levy for the district.

(Emphasis added.)

The current general reassessment of property tax valuations has caused the equalized assessed valuations of some school districts to increase.

We believe that Section 137.073.5(2), RSMo Supp. 1985, was intended by the legislature to apply only to losses of state aid caused by the Hancock Amendment tax rate rollback, Article X, Section 22 (a), Missouri Constitution, even though such application may be constitutionally questionable. Your question concerns losses of state aid caused by increases in a school district's equalized assessed valuation. The statutory language quoted above in Section 137.073.5(2), RSMo Supp. 1985, has no application to losses of state aid caused by increases in a school district's equalized assessed valuation.

We conclude that Section 137.073.5(2), RSMo Supp. 1985, does not authorize the modification of the tax rate ceiling by simple majority vote of the local board to recapture losses of state school aid funds resulting from an aggregate increase in assessed valuation within the school district.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
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February 4, 1986

OPINION LETTER NO. 7-86

FILED
7

The Honorable James R. Strong
Senator, District 6
State Capitol Building, Room 225
Jefferson City, Missouri 65101

Dear Senator Strong:

This letter is in response to your question which is as follows:

> Must the balance in the unemployment compensation fund, under sections 288.121 and 288.122, reach the designated level for four consecutive calendar quarters or for a single calendar quarter for the triggering of an adjustment to the surcharge or the tax table for the succeeding calendar year?

Section 288.121, RSMo Supp. 1984, provides:

> If the lowest balance, less any federal advances in the unemployment compensation trust fund on March 31, 1984, or on any March thirty-first, June thirtieth or September thirtieth or December thirty-first, thereafter, is less than two hundred fifty million dollars, then each employer's contributions due for the four calendar quarters of the succeeding calendar year shall be increased by the percentage determined from the following table:

Balance in Trust Fund

Less Than	Equals or Exceeds	Percentage of Increase
$250,000,000	$200,000,000	20%
$200,000,000		30%

Section 288.122, RSMo Supp. 1984, provides:

> If the lowest balance, less any federal advances in the unemployment compensation trust fund on March 31, 1984, or on any March thirty-first, June thirtieth or September thirtieth or December thirty-first, thereafter, is more than three hundred fifty million dollars, then the contributions due from each employer shall, for the four calendar quarters of the succeeding calendar year, be decreased by the percentage determined from the following table:

Balance in Trust Fund

More Than	But Less Than	Percentage of Decrease
$350,000,000	$400,000,000	5%
$400,000,000		10%

The underlying question is the percentage increase under Section 288.121, RSMo Supp. 1984, for calendar year 1986? The purpose of the enactment is solvency of the unemployment compensation trust fund.

Section 288.121 refers to the "lowest balance" (less any federal advances) of the unemployment compensation trust fund at the end of "any" quarter. If that balance is below $250,000,000 but is equal to or exceeds $200,000,000 the percentage of increase is 20 percent. If the balance is below $200,000,000 the percentage of increase is 30 percent. The percentage of increase of each employer's contribution due for the four calendar quarters of the succeeding calendar year is triggered by the lowest balance less federal advances in the fund on any March 31, or June 30, or September 30, or December 31.

In examining the relevant statutory sections, we are obligated to determine legislative intent from the plain words and phrases. Section 1.090, RSMo 1978. Statutes should be given a reasonable construction. Estate of Huskey v. Monroe, 674 S.W.2d 205 (Mo. App. S.D. 1984)

The increase or decrease in the employer tax contributions depends on the amount in the unemployment compensation trust

fund at the end of each quarter. The increase or decrease is effective for the four calendar quarters of the succeeding calendar year. The triggering quarters are stated disjunctively by the word "or". We conclude from the plain unequivocal language of the statutes above set out that the increase or decrease in the employer contributions for the four quarters of a succeeding calendar year depends on the lowest balance in the trust fund, less federal advances, at the end of any single calendar quarter.

The Missouri Division of Employment Security has represented to this office that the lowest balance of the trust fund less federal advances for 1985 was on March 31, 1985, when the balance was well below $200,000,000. The fund improved by the end of December, 1985, when the balance (not the lowest balance in 1985) exceeded $200,000,000. Associated Industries of Missouri concurs in this representation. The question then is the intent of the Missouri legislature as to the percentage of increase under Section 288.121, RSMo Supp. 1984. Clearly the answer is 30 percent considering the lowest balance under the statute on March 31, 1985 was less than $200,000,000. This certainly conforms with the concept of solvency of the fund and is the obvious intended result. Since there appears to be disagreement from a segment of the employer constituency, it is recommended that the issue be resolved legislatively.

Very truly yours,

William L Webster

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March 12, 1986

OPINION LETTER NO. 8-86

Major-General Charles M. Kiefner
Office of the Adjutant General
1717 Industrial Drive
Jefferson City, Missouri 65101

Dear Major-General Kiefner:

This letter is in response to your question asking:

> With regard to Section 105.270, RSMo Supp. 1984:
>
> Does this provision which calls for paid military leave of absence for all periods of military service in performance of duty in the service of the United States under competent orders for a period not to exceed a total of fifteen calendar days in any federal fiscal year, for all officers and employees of the State of Missouri, all departments and agencies of the state, to include county, municipality, school district, and other political subdivision employees, and all other public employees of the state, apply to such Missouri State employees if they are members of the National Guard of another state, e.g., Iowa Army National Guard or Illinois Air National Guard?

Section 105.270, RSMo Supp. 1984, states:

> 1. All officers and employees of this state, or of any department or agency thereof, or of any county, municipality, school district, or other political subdivision, and all other public employees of this state

who are or may become members of the national guard or of any reserve component of the armed forces of the United States, shall be entitled to leave of absence from their respective duties, without loss of time, pay, regular leave, impairment of efficiency rating, or of any other rights or benefits, to which otherwise entitled, for all periods of military services during which they are engaged in the performance of duty or training in the service of this state at the call of the governor and as ordered by the adjutant general without regard to length of time, and for all periods of military services during which they are engaged in the performance of duty in the service of the United States under competent orders for a period not to exceed a total of fifteen calendar days in any federal fiscal year.

2. Before any payment of salary is made covering the period of the leave the officer or the employee shall file with the appointing authority or supervising agency an official order from the appropriate military authority as evidence of such duty for which military leave pay is granted which order shall contain the certification of the officer of performance of duty in accordance with the terms of such order.

3. No member of the organized militia shall be discharged from employment by any of the aforementioned agencies because of being a member of the organized militia, nor shall he be hindered or prevented from performing any militia service he may be called upon to perform by proper authority nor otherwise be discriminated against or dissuaded from enlisting or continuing his service in the militia by threat or injury to him in respect to his employment. Any officer or agent of the aforementioned agencies violating any of the provisions of this section is guilty of a misdemeanor.

Section 105.270, refers to "public employees of the state who are or may become members of the national guard or of any reserve component of the armed forces of the United States . . . for all periods of military service . . . and as ordered by the adjutant general without regard to length of time, and for all periods of military service during which they are engaged in the performance of duty in the service of the United States under competent orders for a period not to exceed a total of fifteen calendar days in any federal fiscal year." This language requires the following: (1) the individual be a public employee of this state, and (2) the Missouri public employee is a member of the national guard or of any reserve component of the armed forces of the United States, and (3) the Missouri public employee be engaged in the training or service for the State of Missouri or be engaging in the performance of duty or training in the service of the United States under competent orders for a period not to exceed a total of fifteen calendar days in any federal fiscal year. We believe this language would entitle a State of Missouri public employee who was a member of another state's national guard to be compensated for service as set forth in Attorney General Opinion No. 1, September 16, 1959, provided that that public employee's orders required said employee to engage in the "performance of duty in the service of the United States."

It should be noted that in Attorney General Opinion Letter No. 35-85, the word "and" in the following phrase was interpreted in the disjunctive:

> . . . periods of military service during which they [public employees] are engaged in the performance of duty or training in the service of this state at the call of the governor <u>and</u> as ordered by the adjutant general . . . .

Thus, the adjutant general of another state could order a State of Missouri public employee who is a member of that other state's national guard to training or service for the United States, thereby coming under the benefits of Section 105.270. Examples of this occurring are as follows:

> 1. IADT (Initial Active Duty for Training) pursuant to 10 U.S.C. §511D (for guard member with no prior service), basic training and advanced training, 12-16 weeks.

These orders are issued for the Adjutant General by the Department of Defense.

2. Out-of-country service pursuant to 10 U.S.C. §672, issued for the Adjutant General but signed by personnel readiness officer.

3. Annual training in country, pursuant to 32 U.S.C. §503, issued for the Adjutant General.

4. Full time training duty (3 weeks, 5 days, pursuant to 32 U.S.C. §505, issued for the Adjutant General by the assistant adjutant.

5. Active army school pursuant to 32 U.S.C. §505, issued for the Adjutant General by the assistant adjutant.

6. Active guard reserve (AGR), pursuant to 32 U.S.C. §502F, issued for the Adjutant General by the Officer Personnel Readiness Manager.

7. Full-time training duty, pursuant to 32 U.S.C. §502F, issued for the Adjutant General by the assistant adjutant.

8. Medical care for condition occurring or developed during active duty, pursuant to 32 U.S.C. §318 and 37 U.S.C. §204H, issued for the Adjutant General by the assistant adjutant.

These examples are not inclusive of all situations where a state's adjutant general issues orders to a national guard member to meet federal training or duty requirements as set forth in Titles 32 and 10.

The other language in this statute, " . . . periods of military service during which they [public employees] are engaged in the performance of duty or training in the service of this state at the call of the governor and as ordered by the adjutant general . . . ," specifically limits this provision to performance of duty or training in the service of this state.

Therefore, a Missouri state employee who is a member of another state's national guard who is called to duty by that other state's governor for any reason or by that other state's adjutant general for state emergency duty, state training, or state ceremonial duties would not come under the benefits of Section 105.270.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

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P. O. Box 899
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January 17, 1986

OPINION LETTER NO. 9-86

FILED
9

The Honorable Jan Martinette
Representative, District 47
6601 East 129th Street
Grandview, Missouri 64030

Dear Representative Martinette:

This letter is in response to your question asking:

> Whether a ballot requesting the voters to authorize a transportation sales tax, pursuant to RSMo 94.705 (Cum. Supp. 1984), may include in the proposition authorizing the tax additional language which mandates the specific uses of revenues from the tax by requiring that 70% of the tax revenues be used for capital improvements, and that 30% of the tax revenues be used for maintenance, with detailed definitions of both categories; and, if the same proposition may not address both the authority to tax and the mandated allocation of revenues, whether a separate proposition on the same ballot may be used to allow the voters to mandate the specific uses of the tax revenues.

Your question concerns the City of Grandview, Missouri, a fourth class city.

Section 94.705.1, RSMo Supp. 1984, states:

> 1. Any city may by a majority vote of its governing body impose a sales tax for transportation purposes enumerated in sections 94.700 to 94.755, but no such ordinance shall become effective unless the council or other governing body submits to the voters of the city, at a city or state

> general, primary, or special election, a proposal to authorize the council or other governing body of the city to impose such a sales tax; except that no vote shall be required in any city that imposed and collected such tax under sections 94.600 to 94.655, before January 5, 1984. The ballot of the submission shall contain, but is not limited to, the following language:
>
> Shall the city of ..... impose a (city's name) sales tax of ..... for transportation (insert amount) purposes?
>
> /___/ Yes
>
> /___/ No
>
> If you are in favor of the question, place an "X" in the box opposite "Yes". If you are opposed to the question, place an "X" in the box opposite "No".
>
> If a majority of the votes cast on the proposal by the qualified voters voting thereon are in favor of the proposal, then the ordinance and any amendments thereto shall be in effect. If a majority of the votes cast by the qualified voters voting are opposed to the proposal, then the council or other governing body of the city shall have no power to impose the tax herein authorized unless and until the council or other governing body of the city submits another proposal to authorize the council or other governing body of the city to impose the tax and such proposal is approved by a majority of the qualified voters voting thereon.

(Emphasis added.)

Section 94.700(9), RSMo Supp. 1984, defines the phrase "transportation purposes" as follows:

> (9) "Transportation purposes" shall mean financial support of a "public mass transportation system"; the construction,

> reconstruction, repair and maintenance of streets, roads and bridges within a municipality; the construction, reconstruction, repair and maintenance of airports owned and operated by municipalities; the acquisition of lands and rights-of-way for streets, roads, bridges and airports; and planning and feasibility studies for streets, roads, bridges, and airports. "Bridges" shall include bridges connecting a municipality with another municipality either within or without the state, with an unincorporated area of the state, or with another state or an unincorporated area thereof.

(Emphasis in original.)

Generally, statutory class cities are creatures of the General Assembly, possessing only those powers expressly granted to them by statute, those powers necessarily or fairly implied in or incidental to their express powers, and those powers essential to the declared objects of the municipality. Any reasonable doubt as to whether a power has been delegated to such a muncipality is resolved in favor of nondelegation. Anderson v. City of Olivette, 518 S.W.2d 34, 39 (Mo. 1975). Your question asks if the voters can dedicate or earmark fixed percentages of transportation sales tax moneys for specific purposes. We are unable to find any specific provision of the statutes expressly granting fourth class cities this power.

It might be argued that the language in Section 94.705.1, RSMo Supp. 1984, providing that the ballot submitted to voters is not limited to the language specified in the statute, impliedly authorizes the dedication or earmarking of funds through the ballot. Although this is a possible reading of the statute, we caution against it for the following reasons.

First, under the Dillon rule, enunciated in the Anderson case, any reasonable doubt as to whether a power has been delegated to a statutory class municipality is resolved in favor of nondelegation. As there is a reasonable doubt as to whether the General Assembly has authorized statutory class municipalities to earmark or dedicate transportation sales tax monies through the ballot, the Dillon rule requires a finding that no such power exists.

Second, a ballot submitting questions on the authority to tax and mandating a particular allocation of the tax monies

thus raised may constitute doubleness in a submission to the voters. Doubleness in submissions at elections is regarded as a species of legal fraud because it may compel the voter, in order to get what he most earnestly wants, to vote for something he does not want. Hart v. Board of Education of Nevada School Dist., 299 Mo. 36, 39-40, 252 S.W. 441, 442 (banc 1923). In this instance it could be argued that the authorization of the transportation sales tax is a separate and distinct proposition from the disposition or allocation of the funds. A legal challenge could be mounted on the doubleness theory. But see Payne v. Kirkpatrick, 685 S.W.2d 891, 905 (Mo. App., W.D. 1985) (holding that the dedication or earmarking of pari-mutuel wagering tax and license fee monies was a matter properly connected to the major subject of the pari-mutuel wagering amendment).

Third, it is established that a municipality may not surrender, transfer, contract away, or delegate governmental powers or duties of officers when such are assigned to an officer by charter or statute. Pearson v. City of Washington, 439 S.W.2d 756, 760 (Mo. 1969). Section 79.110, RSMo 1978, provides that, "The mayor and board of aldermen of each city governed by this chapter shall have the care, management and control of the city and its finances, ..." Dedication or earmarking of funds through the ballot would strip future governmental officers of legislative control over these funds. Absent express statutory provisions authorizing the earmarking of funds, we believe that such earmarking would constitute a surrender or delegation of future legislative control over the transportation sales tax monies to the voters. This practice is questionable.

Weighing the various arguments pro and con, absent express statutory authority authorizing the earmarking of transportation sales tax monies through the ballot, we advise against the inclusion of additional language earmarking transportation sales tax moneys for specific uses in a ballot proposition authorizing the imposition of a transportation tax.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
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March 28, 1986

OPINION LETTER NO. 10-86

The Honorable Dennis Smith
Senator, District 30
State Capitol Building, Room 328
Jefferson City, Missouri 65101

FILED
10

Dear Senator Smith:

This letter is in response to your question asking whether participation by a milk processor or distributor or milk product purchaser in a vendor support program, which you describe, is in violation of § 416.410 et seq. RSMo.

It is understood by this office that a vendor support program typically involves funds made available for advertising purposes to a retail seller of goods by a manufacturer or distributor thereof. The amount of such funds is generally a fixed percentage of gross receipts, and the vendor may require a financial contribution by the retailer in an advertising program which it sponsors.

The vendor support program referred to in your letter appears to differ from the typical program as follows:

1. A third-party organizer contacts a retailer and requests a list of its principal vendors and the dollar volume of business transacted therewith. If the dollar volume of a particular product exceeds a threshold amount, generally $30,000 annually, the retailer is considered eligible for the vendor support program.

2. The organizer then prepares a videotape presentation of a proposal for a special advertising promotion of the vendor's product. The videotape is forwarded to the vendor together with a request for a specific contribution of funds needed for the promotion. The funds requested are supplemental to the usual percentage advertising allowance. Ordinarily, submission of the videotape to a vendor is followed by one or more meetings between the vendor and retailer to plan the advertising program.

3. In conformity with Federal Trade Commission requirements, a vendor who agrees to support the special advertising program agrees also to make available advertising contributions to all of the retailers of its product in the relevant market area. However, the third-party organizer will prepare an advertising program proposal only for retailers having the requisite dollar volume.

4. In addition to financial contributions, vendors frequently furnish advertising materials and place sales representatives in stores during the special promotions.

5. The vendor funds contributed to a retailer advertising program are typically expended for preparing and broadcasting television and radio advertisements, newspaper and billboard advertisements, or any combination thereof that is deemed to have the optimum sales promotion effect for a particular retail business in its market area. The size and effect of the special advertising promotion thus depends on the size and scale of business of the individual retailer. The most important accounts will be those companies having multiple retail outlets.

Section 416.440, RSMo 1978, provides, in pertinent part:

> 1. No milk processor or distributor shall, with the intent or with the effect of unfairly diverting trade from a competitor, or otherwise injuring a competitor, or of destroying competition, or of creating a monopoly, give or offer to give any milk product purchaser any rebate, discount, free service or services, advertising allowance, pay for advertising space used jointly, donation, free merchandise, rent on space used by the retailer for storing or displaying the milk processor's or distributor's merchandise, financial aid, free equipment, or any other thing of value; except the bona fide return by a cooperative association to its members on a patronage basis of the savings realized on products sold and distributed to the members or patrons.
>
> * * *
>
> 3. No milk product purchaser shall accept from any milk processor or distributor any rebate, discount, free service or services, any advertising allowance, pay for advertising space used jointly, donation, free merchandise, rent on space used by retailer for

> storing or displaying the milk processor's or distributor's merchandise, financial aid, free equipment, or any other thing of value; except the bona fide receipt from a cooperative association of a patronage refund based on the patronage of the purchaser with the cooperative association.

Section 416.440.1 makes the giving of a donation or an advertising allowance by a milk processor or distributor to a milk retailer, a violation of the Act, if it is done with the intent or effect of unfairly diverting trade from a competitor, or otherwise injures a competitor. The principal purpose of the above-described vendor support program, is to induce milk processors and distributors to contribute funds to milk retailers for advertising purposes. It is immaterial whether such contributions are classified as "donations" or "advertising allowances," because they are direct payments by a milk vendor to a milk retailer. None of the reasoning contained in recent case law involving the giving of indirect advantages to a retailer [Fleming Foods of Missouri, Inc. v. Runyon, 634 S.W.2d 183 (Mo. banc 1982)] is required to reach the conclusion that the payments applicable to a vendor support program are of the type proscribed by § 416.440(1) as to processors and distributors, and of the type, receipt of which by a retailer is proscribed by § 416.440(3).

Such payments, however, violate the statute only if they are made with the intent, or have the effect of unfairly diverting trade from a competitor, or otherwise injure a competitor, destroy competition, or create a monopoly. Section 416.440(1). In general, resolution of the issues of intent and effect is dependent upon the facts and circumstances of the individual case. Borden Company v. Thomason, 353 S.W.2d 735, 754; (Mo. banc 1962) State ex rel. Davis v. Thrifty Foodliner, Inc., 432 S.W.2d 287, 290 (Mo. 1968). The fact situations described in the cases decided under this Chapter illustrate this principle.

In Fleming Foods of Missouri, Inc. v. Runyon, supra, the court found that a systematic program of aid pursuant to a franchising arrangement, and involving preferential loans, leases and equipment sales, even though not directly related to milk products, still resulted in a "competitive edge . . . [which] . . . would carry into the direct sale of milk products. . . . The giving of such services and things of value is clearly intended to and would have the effect of diverting trade from competing distributors in the field of milk and milk product sales." Id. at 193.

However, in the case of State ex rel Thomason v. Adams Dairy Company, 379 S.W.2d 553 (Mo. 1964), a dairy furnished milk to a retailer to be given away free to the public. The court found no violation of the act because the giveaway was

promotional in nature, lasted only a few days, and resulted in capture of less than 3% of business in the relevant market area.

Similarly, in State ex rel. Davis v. Thrifty Foodliner, Inc., supra, a retailer sold milk at below cost in a "loss leader" sales format as part of a promotional sales program. The court found no evidence of any injury to competitors, and held that the loss leader practice was not contrary to the public policy of Missouri. Id. at 291.

The vendor support program outlined in your letter is of limited duration, and it appears to contain elements promotional in nature. There are some factual similarities to the Adams and Thrifty Foodliner cases. Correspondingly, there is no long term comprehensive program of indirect economic advantages extended to milk retailers, such as was found to violate the Act in Fleming. The possible impact a vendor support program may have on competition in any particular market area is conjectural and it would be inappropriate for this office to speculate on or assume a factual context not in existence. In any event, the question of effect or intent in regard to diverting trade or injuring competition is one of fact and must be decided by the courts.

In making such factual determination, however, a court may be guided by the rulings in Adams, supra, and Thrifty Foodliner, supra, which emphasized that "increasing one's sales of milk is not 'in and of itself' illegal unless the intent or effect is not merely to divert trade but to unfairly divert such trade." State ex rel. Davis v. Thrifty Foodliner, supra, at 291. The vendor support program as developed by an organizer, would exclude all retailers not meeting a requisite dollar volume in milk products. Funds would be offered to such competitors, but not the entire program, i.e., video tape presentation. This could be interpreted, and a court may so find, that such exclusion constitutes a discriminatory gift that works an unfairness upon the excluded parties. Foremost Dairies, Inc. v. Thomason, 384 S.W.2d 651, 660 (Mo. en banc 1964).

It has been noted also that the vendor funds would pay the cost of television, radio and newspaper advertisements. These costs may be divided separately into the costs of producing the advertisement, and the sum of unit costs of the respective television, radio or newspaper spot ads. As between competitors, the cost of producing an advertisement may be equal, but the party having the larger budget (based on sales volume) could afford more showings of the advertisement, thus discriminating against, and working an unfairness on the party having the smaller budget. If this is done with the requisite intent, or has the effect of diverting trade, a violation of the Act would exist.

In response to your query as to which milk products are affected by the Act, please note the 1982 amendment to § 416.410 deletes cottage cheese and now defines "milk product" only as the

various forms of fluid milk products therein listed. Section 416.410 RSMo Supp. 1984.

We conclude that a milk vendor support program as described would be in violation of § 416.440.1 and § 416.440.3 if its exclusion of some competitors from the benefits of the entire program works an unfairness as to the excluded parties, and, if the program results, in fact, in a diversion in trade from other competitors or otherwise injures such other competitors.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

ATTORNEY GENERAL OF MISSOURI

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March 12, 1986

OPINION LETTER NO. 14-86

FILED
14

The Honorable Marvin E. Proffer
Representative, District 158
State Capitol Building, Room 306
Jefferson City, Missouri 65101

Dear Representative Proffer:

This letter is in response to your request for an opinion as to whether any part of an appropriation "[f]or the purpose of funding the annual lease/purchase cost of a maximum/medium security correctional facility" made as part of Section 9.201 of the Conference Committee Substitute for House Bill No. 9, Eighty-Third General Assembly can be used "to pay for preparation of a request for proposal that includes program development, cost estimates, quality standards, conceptual drawings and other matters relative to requesting proposals for a lease/purchase project but not directly related to an annual lease/purchase cost?"

Article IV, Section 23 of the Missouri Constitution requires the legislature to specify the amount and purpose of each appropriation. In accordance with that provision, Section 9.201 of the Conference Committee Substitute for House Bill No. 9 specifies that an appropriation be made:

> To the Department of Corrections
> and Human Resources
> For the Division of Adult Institutions
> For the purpose of funding the annual
> lease/purchase cost of a maximum/medium
> security correctional facility
> From General Revenue Fund $4,642,000

Article IV, Section 28 of the Missouri Constitution provides that every expenditure made or obligation incurred shall be made pursuant to the purpose of an appropriation.

The Department of Corrections and Human Resources seeks to use a portion of the appropriation to enter into a consulting agreement with a private corporation whereby the corporation prepares an "RFP" (Request for Proposals) for the lease/purchase of a five hundred-bed medium/maximum security correctional facility and then represents the state during the planning, bidding, design, construction and warranty period of the lease/purchase correctional facility. Your query appears to raise two issues. First, are the expenses of the request for proposals related to the lease/purchase cost? Second, does the reference to "the annual" lease/purchase cost limit the Department of Corrections and Human Resources to contracting for services to be performed one year at a time?

The purpose of the appropriation is to obtain the services of a medium/maximum security correction facility. Presumably, the legislature intended the Department to spend its appropriation efficiently in order to get the most return per dollar spent. Because efficient spending requires planning, it could well be that money spent planning the lease/purchase project is a necessary expenditure. The appropriation is a general one leaving the Department of Corrections and Human Resources to determine how the funds might best be used to achieve this purpose. This office has consistently advised its clients that an expenditure necessary to further the purpose of an appropriation may be made with the appropriated funds. See Opinion No. 73, dated October 19, 1953, to Ragland, copy enclosed.

The second part of your query appears to concern the effect of the words "the annual" as a limitation on the use of the appropriated funds. Given that it is reasonable to plan the lease/purchase expenditure, the Department of Corrections and Human Resources is faced with a pair of alternatives. It can either plan the whole project at once or plan one year at a time. Because individual one-year plans can lead to a duplication of effort or inconsistent results, it appears that the decision to plan the whole project at once, at the outset, is the rational alternative.

This global approach to planning is justified so long as it directly relates to the stated purpose of the appropriation. In the present case, although the planning expenditure is directly related to actions to be taken this year, the expenditure probably will affect subsequent years, too. In particular, planning now should result in future efficiency. Expenditures and encumbrances made pursuant to an appropriation are not void simply because their effects extend beyond the stated purpose of the appropriation. Note that if the

Department's actions related exclusively to future years, it would not directly relate to the stated purpose of the appropriation. This conclusion is consistent with prior opinions from this office. See Opinion No. 59, dated January 28, 1954, to McHaney, copy enclosed.

Funds appropriated under Section 9.201 of the Conference Committee Substitute to House Bill No. 9 may be used for the stated purpose of the appropriation and as necessary to effectuate the stated purpose. Although all expenditures must directly relate to the stated purpose, expenditures are not void merely because they have effects beyond the stated purpose.

Yours very truly,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

Enclosures:

Opinion No. 73, Ragland, 1953
Opinion No. 59, McHaney, 1954

ATTORNEY GENERAL OF MISSOURI

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February 21, 1986

OPINION LETTER NO. 16-86

FILED
16

Michael L. Midyett
Prosecuting Attorney
Chariton County Courthouse
Post Office Box 205
Keytesville, Missouri 65261

Dear Mr. Midyett:

This letter is in response to your question asking:

Does Section 65.530 RSMo., which states:

> The county court of each county shall have power to alter the boundary of townships and to increase or diminish their number, as follows, viz: Upon the petition of one-fourth of the voters of the township or townships proposed to be altered, the county court shall submit the proposed alteration to the qualified voters thereof, at any regular township election, by giving at least thirty days' notice thereof to such township or townships, in the usual manner of giving election notices; and if such alteration shall be ratified by a majority of two-thirds of the votes cast by the voters affected thereby, then such alteration shall be confirmed by the county court, and each township shall be named in accordance with the expressed wishes of its inhabitants.

require,

1. A petition of one-fourth of the voters from EACH township or one-fourth of the TOTAL voters of ALL townships affected; and

2. A ratification by a majority of two-thirds of the votes from EACH township or two-thirds of the TOTAL votes cast?

You state the facts as follows:

> Missouri Township in southern Chariton County, Missouri, has a population of less than twenty-five persons and is divided by the Chariton River which generally runs north and south through said township. The western portion of Missouri Township borders with Bowling Green Township in Chariton County and the eastern portion of Missouri Township borders with Chariton Township of Chariton County. None of the Missouri Township residents live on the western side of the Chariton River. There is no bridge or crossing of the Chariton River in Missouri Township. The closest crossing of the Chariton River is a bridge on Highway 24 and a trip from each side of the Missouri Township would be approximately twenty-five to thirty miles. Most of the farmland on the western side of the Chariton River in Missouri Township is either owned or farmed by residents of Bowling Green Township. Many of these farmers have complained that the Township Board of Missouri Township has failed to adequately and properly maintain the roads on the western portion of Missouri Township which is Missouri Township's responsibility. The farmers have to maintain their own roads. A significant number of voters of Bowling Green Township are in the process of petitioning the Chariton County Commission for an election to change the boundary of Bowling Green Township to include that portion of Missouri Township west of the Chariton River. It is further contemplated that the voters of

Michael L. Midyett

> Chariton township and possibly Missouri Township will petition the Chariton County Commission to change the boundary of Chariton Township to include that portion of Missouri Township east of the Chariton River thereby totally eliminating Missouri township as a separate entity and thereby becoming parts of Bowling Green Township and Chariton Township. It is easily contemplated that more than one-fourth of the voters in Bowling Green Township will sign such a petition and more than two-thirds of the votes cast from Bowling Green Township will ratify this action. It is further contemplated that less than one-fourth of the voters of Missouri Township will sign such a petition and if the same is submitted to the voters of Missouri Township, that less than two-thirds of the voters of Missouri Township would ratify such a change.
>
> The County Commission of Chariton County, Missouri, is unable to determine whether the petition must be presented signed by one-fourth of the voters from each township or from one-fourth of the total voters from all townships affected and even if that is accomplished, they are unable to determine whether ratification of such an alteration can be made by a majority of two-thirds of the votes from all of the votes cast.

We believe that Section 65.530, RSMo 1978, requires the petition to be signed by one-fourth of the total voters of the townships proposed to be altered, and such alteration must be ratified by two-thirds of the total votes cast by the voters affected thereby. Cf. 71.015(6), RSMo Supp. 1984 (sometimes requiring separate majorities in a city and the area to be annexed to approve the annexation).

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

ATTORNEY GENERAL OF MISSOURI

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March 12, 1986

OPINION LETTER NO. 18-86

FILED
18

The Honorable Mike Lybyer
Senator, District 16
State Capitol Building, Room 333
Jefferson City, Missouri 65101

Dear Senator Lybyer:

This opinion is in response to your questions asking:

> If voters abolish township form of government, what would the maximum tax rates be for road and bridge purposes and for general revenue purposes, furthermore, would the county need a special election to establish these tax limits or does the County Commission set the rates according to the statutes of Missouri and the Missouri Constitution?

Because your opinion request is devoid of any specific facts involving these questions, we will utilize the following hypothetical: X County is a third class, township organization county with less than three hundred million dollars ($300,000,000.00) assessed valuation. On November 4, 1980, the date of the Hancock Amendment, Missouri Constitution, Article X, Sections 16-24, was approved, X County had a general operating levy of fifty cents ($.50) per one hundred dollars ($100.00) assessed valuation, which had been imposed without a vote of the people under Missouri Constitution, Article X, Section 11(b)[1] and Section 137.065.1, RSMo 1978.[2] Ten cents ($.10) of that fifty cent ($.50) levy was apportioned to the townships under Sections 65.380[3] and 137.070, RSMo 1978.[4]

Prior to November 4, 1980, all of the townships in X County formed each township into a single road district under what is now Section 231.160, RSMo 1978.[5] See also Section 65.390, RSMo 1978. There are no special road districts organized under Chapter 233, RSMo, in X County. Prior to November 4, 1980, the

voters of the road district voted in a levy of thirty-five cents ($.35) per one hundred dollars ($100.00) assessed valuation for road and bridge purposes under Missouri Constitution, Article X, Section 12(a).[6] See State ex rel. to use of Moore v. Wabash R. Co., 35 Mo. 380, 208 S.W.2d 223 (1948) (holding that townships are not road districts for purposes of the additional, voter-approved, thirty-five cent ($.35) road and bridge levy in Missouri Constitution, Article X, Section 12(a)).

After the 1978 amendment to Missouri Constitution, Article X, Section 12(a) but prior to November 4, 1980, all of the townships in X County imposed a levy of fifty cents ($.50) per one hundred dollars ($100.00) assessed valuation for road and bridge purposes without a vote of the people under Missouri Constitution, Article X, Section 12(a). See Opinion No. 129, Lybyer, 1979 (concluding that the thirty-five to fifty cent ($.35 to $.50) voter approval requirement of the 1978 amendment to Missouri Constitution, Article X, Section 12(a) applies only to counties and that the thirty-five cent ($.35) limitation in Section 137.585, RSMo 1978, was superseded by the 1978 amendment to Missouri Constitution, Article X, Section 12(a)), copy enclosed. X County, itself, did not have a tax levy for road and bridge purposes on November 4, 1980.

In 1985, X County and its townships and road districts were subjected to both the general reassessment tax rate rollback under Section 137.073.2, RSMo Supp. 1985,[7] and the Hancock Amendment tax rate rollback, Missouri Constitution, Article X, Section 22(a).[8] X County's general operating levy was rolled back to forty-five cents ($.45) under the statutory rollback and to forty-six cents ($.46) under the Hancock Amendment rollback, resulting in a general operating levy of forty-five cents ($.45) per one hundred dollars ($100.00) assessed valuation. See Section 137.073.5(2), RSMo Supp. 1985;[9] Opinion No. 46, Proffer, 1982 (requiring the lowest of the two figures to be imposed). Nine cents ($.09) of X County's forty-five cent ($.45) general operating levy is allocated to the townships under Section 137.070, RSMo 1978.

More than six (6) months prior to the general election to be held on November 4, 1986, a petition signed by at least one hundred (100) qualified electors of X County praying for the abolition of township organization is filed with the X County Commission under Section 65.610, RSMo 1978.[10] The X County Commission submits the following question to the voters at a special election called within sixty (60) days of the filing of the petition but prior to the last day for setting 1986 property tax rates, to-wit:

OFFICIAL BALLOT
(Check the one for which you wish to vote.)

Shall township organization form of county government be abolished in _____ County?

YES _____

NO _____

A majority of the voters approve the abolition of township organization, and as provided in Section 65.610, RSMo 1978: "[E]xcept as provided in section 65.620[11] all laws in force in relation to counties not having township organization shall immediately take effect and be in force in such county." (Endnote added.) X County does have time to create general road districts in the county under Section 231.010, RSMo 1978,[12] before the 1986 tax-rate-setting deadline.

I.

Maximum X County General Operating Levy Which Can Be Imposed Without an Election.

Missouri Constitution, Article X, Section 11(b) and Section 137.065, RSMo 1978, authorize X County to impose a levy of fifty cents ($.50) per one hundred dollars ($100.00) assessed valuation for "county purposes". (This levy has been rolled back to forty-five cents ($.45) in the hypothetical.) Section 137.070, RSMo 1978, requires the apportionment of this levy for "county purposes" to the county and to the townships on an eighty percent/twenty percent (80%/20%) basis. The twenty percent (20%) moneys from the county general operating levy which are allocated to the townships are not independent levies of townships but are merely an allocation of county taxes over to political subdivisions of the counties. See State ex rel. Conrad v. Piper, 214 Mo. 439, 114 S.W. 1, 2 (banc 1908). Thus, when the voters in X County abolish the township form of government, they do not abolish authority for the twenty percent (20%) moneys allocated to the townships, because the twenty percent (20%) moneys are part of the county levy and such is not an independent levy of the township that is abolished when the township form of government is abolished.

Accordingly, the maximum general operating levy that X County could impose without a vote is forty-five cents ($.45) per one hundred dollars ($100.00) assessed valuation.

II.

Maximum X County Road and Bridge Levy Which Can Be Imposed Without an Election.

Missouri Constitution, Article X, Section 12(a) and Section 137.555, RSMo 1978,[13] authorize counties not under township organization to impose a road and bridge levy of thirty-five cents ($.35) per one hundred dollars ($100.00) assessed valuation without a vote. The 1978 amendment to Missouri Constitution, Article X, Section 12(a) increased the maximum county road and bridge levy to fifty cents ($.50) per one hundred dollars ($100.00) assessed valuation; provided, that any county road and bridge levy above thirty-five cents ($.35) has to be voter-approved.

Missouri Constitution, Article X, Section 22(a) provides in part:

> (a) Counties and other political subdivisions are hereby prohibited from levying any tax, license or fees, not authorized by law, charter or self-enforcing provisions of the constitution when this section is adopted or from increasing the current levy of an existing tax, license or fees, above that current levy authorized by law or charter when this section is adopted without the approval of the required majority of the qualified voters of that county or other political subdivision voting thereon. . . .

(Emphasis added.)

In the instant hypothetical, X County was "not authorized by law" to impose a road and bridge levy on November 4, 1980. See Missouri Constitution, Article X, Section 12(a) (allowing only the county courts of counties not under township government to impose road and bridge levies). Because X County was not authorized by law to impose a road and bridge levy on November 4, 1980, it must have voter approval to now impose a road and bridge levy under Missouri Constitution, Article X, Section 22(a). X County cannot impose a road and bridge levy without voter approval.

The X County general road districts are in a similar situation. When township organization was abolished, the township road districts were also abolished. The newly formed

county general road districts must obtain voter approval before they can impose the additional thirty-five cents ($.35) per one hundred dollars ($100.00) assessed valuation road and bridge levy authorized by Missouri Constitution, Article X, Section 12(a). This result is not only reached under the Hancock Amendment but also under the language of Missouri Constitution, Article X, Section 12(a), itself.

III.

The Maximum X County Road and Bridge Levy Which Can be Imposed With a Vote of the People.

Missouri Constitution, Article X, Section 12(a) allows X County to impose a county road and bridge levy of fifty cents ($.50) per one hundred dollars ($100.00) assessed valuation; provided, that the rate above thirty-five cents ($.35) must be approved by a vote. See note 6, supra. The thirty-five cent ($.35) limitation in Section 137.555, RSMo 1978, should be disregarded. See Opinion No. 129, Lybyer, 1979. Missouri Constitution, Article X, Section 12(a) also allows the voters of general road districts to authorize a levy of up to thirty-five cents ($.35) per one hundred dollars ($100.00) assessed valuation to be used for road and bridge purposes.

As stated earlier, we believe the Hancock Amendment, Missouri Constitution, Article X, Section 22(a), is applicable to the initial imposition of the X County road and bridge levy and to the initial imposition of X County's general road districts. The rollback formula found in Section 137.073.6(1)(b), RSMo Supp. 1985,[14] is inapplicable to these levies, because these levies did not exist in 1985, the year of the tax rate rollbacks, and such could not be reduced under those provisions.

Accordingly, X County may impose a road and bridge levy of fifty cents ($.50) per one hundred dollars ($100.00) assessed valuation upon a simple majority vote of the electorate. X County may impose an additional thirty-five cents ($.35) per one hundred dollars ($100.00) assessed valuation levy for road and bridge purposes upon a simple majority vote of the electorate in its general road districts.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

NOTES

(For clarity, section quotations generally include headings by the Revisor of Statutes.)

[1]Missouri Constitution, Article X, Section 11(b) states, in part:

> Section 11(b). Limitations on local tax rates. Any tax imposed upon such property by municipalities, counties or school districts, for their respective purposes, shall not exceed the following annual rates:
>
> * * *
>
> For counties -- thirty-five cents on the hundred dollars assessed valuation in counties having three hundred million dollars or more, assessed valuation and having by operation of law attained the classification of a county of the first class; and fifty cents on the hundred dollars assessed valuation in all other counties;
>
> * * *

[2]Section 137.065.1, RSMo 1978, states:

> 137.065. Limit of county taxes -- increase -- election -- ballot. -- 1. For county purposes the annual tax on property, not including taxes for the payment of valid bonded indebtedness or renewal bonds issued in lieu thereof, shall not exceed the rates herein specified: In counties having three hundred million dollars or more assessed valuation the rates shall not exceed thirty-five cents on the hundred dollars assessed valuation; and in counties having less than three hundred million dollars assessed valuation the rate shall not exceed fifty cents; provided, that in any county the maximum rates of taxation as herein limited may be increased for not to exceed four years, when the rate and purpose of the increase are submitted to a vote and two-

thirds of the voters of the county voting thereon shall vote therefor.

[3]Section 65.380, RSMo 1978, states:

> 65.380. Estimate of expenses. -- The township board of directors shall, annually, not less than twenty nor more than sixty days prior to the first day of September, make out and file with the clerk of the county court of their county an estimate of the amount of money required to defray the expenses of said township during the next ensuring year. Said estimates shall be signed by the president and attested by the clerk of the board. The clerk of the county court shall cause the same to be placed on the tax books of said township; provided that the amount of such expenses shall not exceed in any one year twenty cents on the hundred dollars assessed valuation of the taxable property within said township.

[4]Section 137.070, RSMo 1978, states:

> 137.070. Apportionment in counties having township organization. -- In all counties in this state which have now or may hereafter adopt township organization, if the amount of revenue desired and estimated by the county court for county purposes and the amount desired and estimated by any township board for township purposes shall together exceed the rate percent on the one hundred dollars valuation allowed by section 11 of article X of the Constitution of Missouri for county purposes, then it shall be the duty of the county court to apportion the tax for county purposes between the county organization and the township organization in the following manner, to wit: Eighty percent of the taxes which may be legally levied for county purposes shall be apportioned to the county organization for county purposes, and twenty percent of such taxes shall be apportioned to the township organization for the purposes provided by section 65.360, RSMo, of the township organization law, as specified by

the township board; but the combined rate for both the county and township organizations shall not exceed the maximum rate provided by the constitution.

[5]Section 231.160, RSMo 1978, states:

231.160. Board to form districts -- boundary lines -- established how -- overseer -- appointment. -- The township board of directors shall form the township into one or more road districts. If the boundary line of any road district is along a public road, then one or the other edge of said road, and not the center line, shall be the boundary line of such road; and, in the event the township boards of adjoining townships are unable to agree upon the boundary lines of roads that are on the boundary lines of townships, then the county court, or county courts, of the particular county, or counties, interested shall settle boundary lines along such township lines. In the month of April each year the board shall appoint a road overseer for each district, who shall serve for one year and until his successor is appointed and qualified. Any road overseer may be removed from office by the township board for incompetency, neglect or other good cause, and a successor may be appointed by them in his stead.

[6]Missouri Constitution, Article X, Section 12(a) states:

Section 12(a). Additional tax rates for county roads and bridges -- road districts -- reduction in rate may be required, how. In addition to the rates authorized in section II [sic] for county purposes, the county court in the several counties not under township organization, the township board of directors in the counties under township organization, and the proper administrative body in counties adopting an alternative form of government, may levy an additional tax, not exceeding fifty cents on each hundred dollars assessed valuation, all of such tax to be collected

and turned in to the county treasury to be used for road and bridge purposes; provided that, before any such county may increase its tax levy for road and bridge purposes above thirty-five cents it must submit such increase to the qualified voters of that county at a general or special election and receive the approval of a majority of the voters voting on such increase. In addition to the above levy for road and bridge purposes, it shall be the duty of the county court, when so authorized by a majority of the qualified electors of any road district, general or special, voting thereon at an election held for such purpose, to make an additional levy of not to exceed thirty-five cents on the hundred dollars assessed valuation on all taxable real and tangible personal property within such district, to be collected in the same manner as state and county taxes, and placed to the credit of the road district authorizing such levy, such election to be called and held in the manner provided by law provided that the general assembly may require by law that the rates authorized herein may be reduced.

[7]Section 137.073.2, RSMo Supp. 1985, states:

2. Whenever changes in assessed valuation that result from a general reassessment of real property within the county are entered in the assessor's books, the county clerk in all counties and the assessor of St. Louis city shall notify each political subdivision wholly or partially within the county of the change in valuation, and each political subdivision wholly or partially within the county, including municipalities maintaining their own tax books, shall immediately revise the rates of levy for each purpose for which taxes are levied to the extent necessary to produce from all taxable property, including state assessed property, substantially the same amount of tax revenue as was produced in the previous year and, in addition thereto, a percentage of the previous year's

> revenues equal to the preceding valuation factor of the political subdivision.

[8]The tax rate rollback provision in Missouri Constitution, Article X, Section 22(a) provides:

> If the assessed valuation of property as finally equalized, excluding the value of new construction and improvements, increases by a larger percentage than the increase in the general price level from the previous year, the maximum authorized current levy applied thereto in each county or other political subdivision shall be reduced to yield the same gross revenue from existing property, adjusted for changes in the general price level, as could have been collected at the existing authorized levy on the prior assessed value.

[9]The relevant language in Section 137.073.5(2), RSMo Supp. 1985, states:

> (2) Each political subdivision shall annually calculate each tax rate it is authorized to levy and, in establishing each tax rate, shall consider each provision for tax rate rollback or reduction, provided in this section and section 22 of article X of the Constitution of Missouri, separately and without regard to annual tax rate reductions provided in sections 67.505 and 164.013, RSMo. Each political subdivision shall set each tax rate it is authorized to levy using the calculation that produces the lowest tax rate ceiling. ...

[10]Section 65.610.1, RSMo 1978, provides:

> 65.610. Abolition of township organization -- procedure. -- 1. Upon the petition of at least on hundred qualified electors of any county having heretofore adopted township organization, praying therefor, the county court shall submit the question of the abolition of township organization to the voters of the county at a general or special election. If the petition is filed six months or more prior

to a general election, the proposition shall be submitted at a special election to be ordered by the county court within sixty days after the petition is filed; if the petition is filed less than six months before a general election, then the proposition shall be submitted at the general election next succeeding the filing of the petition. The election shall be conducted, the vote canvassed and the result declared in the same manner as provided by law in respect to elections of county officers. The clerk of the county court shall give notice that a proposition for the abolition of township organization form of county government in the county is to be voted upon by causing a copy of the order of the county court authorizing such election to be published at least once each week for three successive weeks, the last insertion to be not more than one week prior to the election, in some newspaper published in the county where the election is to be held, if there is a newspaper published in the county and, if not, by posting printed or written handbills in at least two public places in each election precinct in the county at least twenty-one days prior to the date of election. The clerk of the county court shall provide the ballot which shall be printed and in substantially the following form:

OFFICIAL BALLOT
(Check the one for which you want to vote)

Shall township organization form of county government be abolished in _____ County? YES __ No __

If a majority of the electors voting upon the proposition shall vote for the abolition thereof the township organization form of county government shall be declared to have been abolished; and township organization shall cease in said county; and except as provided in section 65.620 all laws in force in relation to counties not having township

organization shall immediately take effect and be in force in such county.

[11]Section 65.620, RSMo Supp. 1984, states:

> 65.620. Abolition of township government -- effect -- 1. Whenever any county abolishes township organization the county treasurer and ex officio collector shall immediately settle his accounts as treasurer with the county court and shall thereafter perform all duties, exercise all powers, have all rights and be subject to all liabilities imposed and conferred upon the county collector of revenue under chapter 52, RSMo, until the first Monday in March after the general election next following the abolishment of township organization and until a collector of revenue for the county is elected and qualified. The person elected collector at the general election as aforesaid, if that election is not one for collector of revenue under chapter 52, RSMo, shall serve until the first Monday in March following the election and qualification of a collector of revenue under chapter 52, RSMo. Upon abolition of township organization a county treasurer shall be appointed to serve until the expiration of the term of such officer pursuant to chapter 54, RSMo.
>
> 2. Upon abolition of township organization, title to all property of all kinds theretofore owned by the several townships of the county shall vest in the county and the county shall be liable for all outstanding obligations and liabilities of the several townships.
>
> 3. The terms of office of all township officers shall expire on the abolition of township organization and the township trustee of each township shall immediately settle his accounts with the county clerk and all township officers shall promptly deliver to the appropriate county officers, as directed by the county court,

all books, papers, records and property pertaining to their offices.

[12]Section 231.010, RSMo 1978, states:

231.010. County courts to divide counties into road districts. -- The county courts of all counties, other than those under township organization, shall, during the month of January, 1918, with the advice and assistance of the county highway engineer, divide their counties into road districts, all to be numbered, of suitable and convenient size, road mileage and taxable property considered. Said courts shall, during the month of January biennially thereafter, have authority to change the boundaries of any such road district as the best interest of the public may require.

[13]Section 137.555, RSMo 1978, states:

137.555. Special road and bridge tax, how levied, collected and disbursed. -- In addition to other levies authorized by law, the county court in counties not adopting an alternative form, of government and the proper administrative body in counties adopting an alternative form of government, in their discretion may levy an additional tax, not exceeding thirty-five cents on each one hundred dollars assessed valuation, all of such tax to be collected and turned into the county treasury, where it shall be known and designated as "The Special Road and Bridge Fund" to be used for road and bridge purposes and for no other purpose whatever; provided, however, that all that part or portion of said tax which shall arise from and be collected and paid upon any property lying and being within any special road district shall be paid into the county treasury and four-fifths of such part or portion of said tax so arising from and collected and paid upon any property lying and being within any such special road district shall be placed to the credit of such special road district from which it

> arose and shall be paid out to such special road district upon warrants of the county court, in favor of the commissioners or treasurer of the district as the case may be; provided further, that the part of said special road and bridge tax arising from and paid upon property not situated in any special road district and the one-fifth part retained in the county treasury may, in the discretion of the county court, be used in improving or repairing any street in any incorporated city or village in the county, if said street shall form a part of a continuous highway of said county leading through such city or village.

The thirty-five cent ($.35) limitation in this statute should be disregarded. See Opinion No. 129, Lybyer, 1979.

[14]Section 137.073.6(1)(b), RSMo Supp. 1985, provides:

> 6. (1) In all political subdivisions except school districts, the tax rate ceiling established pursuant to this section shall not be exceeded in the year of the tax rate reduction or thereafter unless a higher tax rate is approved by a vote of the people. Approval of the higher tax rate shall be by at least a majority of votes cast, except:
>
> * * *
>
> (b) When a higher tax rate, before reduction, could have been approved by a majority of the votes cast, the maximum tax rate increase that can be approved by a majority after reduction shall be completed as follows: The maximum cumulative percent the original tax rate ceiling can be increased by a majority vote in the future shall be the same percent which the tax rate prior to reduction was exceeded by the maximum tax rate that could be voted by a majority; any increase in the tax rate ceiling beyond that percent shall require approval by at least two-thirds of the votes cast; ...

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

February 11, 1986

OPINION LETTER NO. 19-86

The Honorable Roy Blunt
Secretary of State
Office of the Secretary of State
State Capitol Building
Post Office Box 778
Jefferson City, Missouri 65102

Dear Secretary Blunt:

This letter is in response to your request for our review under Sections 116.332 and 116.334, RSMo Supp. 1985, for sufficiency as to the form of a petition regarding "the following proposed law contained in House Bill No. 543". We conclude that the petition should be rejected for the following reasons.

I.

It is Unclear Whether this Petition is an Initiative or Referendum.

The petition in question is labelled as an initiative petition. As previously stated, the petition proposes the adoption of House Bill No. 543. The session of the General Assembly that considered this bill is not stated. The First Regular Session of the Eighty-Third General Assembly passed and the Governor approved a House Bill No. 543 enacting six sections relating to initiative and referendum petitions denominated as Sections 116.150, 116.160, 116.190, 116.230, 116.332, and 116.334, RSMo Supp. 1985. It is unclear whether this petition proposes the adoption of a House Bill No. 543 considered but not passed by some unknown session of the General Assembly, whether this petition is intended as a referendum on House Bill No 543 as enacted by the First Regular Session of the Eighty-Third General Assembly of the State of Missouri or whether the reference is erroneous.

II.

If this Petition is a Referendum,
It Was Not Timely Filed.

Missouri Constitution, Article III, Section 52(a) states in part: "Referendum petitions shall be filed with the secretary of state not more than ninety days after adjournment of the session of the general assembly which passed the bill on which the referendum is demanded." This sample petition was submitted to the Secretary of State more than ninety days after the adjournment of the First Regular Session of the Eighty-Third General Assembly of the State of Missouri. Therefore, a referendum petition on House Bill No. 543, Eighty-Third General Assembly, First Regular Session, could not be timely filed.

III.

If this Petition is an Initiative,
It Fails to Comply with
Missouri Constitution, Article III, Section 50.

Missouri Constitution, Article III, Section 50 states in part: "Every such petition . . . shall contain an enacting clause and the full text of the measure." This petition, if construed as an initiative, fails to comply with the above-quoted constitutional provisions, because the petition does not contain the full text of the measure proposed or an enacting clause.

Due to the limited amount of time allowed for this review under Section 116.334.1, RSMo Supp. 1985, please understand that this review is not exhaustive, that you and your staff may find other deficiencies in the petition, and other deficiencies may exist.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

April 28, 1986

OPINION LETTER NO. 20-86

FILED
20

The Honorable Weldon W. Perry, Jr.
Prosecuting Attorney, Lafayette County
Courthouse Annex
Post Office Box 59
Lexington, Missouri 64067

Dear Mr. Perry:

This letter is in response to your question asking whether Section 211.031, RSMo Supp., 1984, authorizes the incarceration of a sixteen year old person in an adult correctional facility (i.e., County Jail) upon conviction for a violation of a State or municipal traffic ordinance or regulation, the violation of which does not constitute a felony?

Section 211.031, provides in part:

> 1. Except as otherwise provided herein, the juvenile court shall have exclusive original jurisdiction in proceedings:
>
> * * *
>
> (2) Involving any child who may be a resident of or found within the county and who is alleged to be in need of care and treatment because:
>
> * * *
>
> (e) The child is charged with an offense not classified as criminal, or with an offense applicable only to children; except that, the juvenile court shall not have jurisdiction over any child sixteen years of age who is alleged to have violated a state or municipal traffic ordinance or regulation, the violation of which does not constitute a felony;

* * *

> (3) Involving any child who is alleged to have violated a state law or municipal ordinance, or any person who is alleged to have violated a state law or municipal ordinance prior to attaining the age of seventeen years, in which cases jurisdiction may be taken by the court of the circuit in which the child or person resides or may be found or in which the violation is alleged to have occurred; except that, the juvenile court shall not have jurisdiction over any child sixteen years of age who is alleged to have violated a state or municipal traffic ordinance or regulation, the violation of which does not constitute a felony;

The facts you have given us indicate that your question primarily concerns shock probation.

It is clear that the effect of the quoted provisions is to declare a child sixteen years of age to be an adult for purposes of criminal prosecution in instances of violation of nonfelony state or municipal traffic laws or ordinances. It follows that under a strict reading of the statutes it appears that such person upon conviction for such a violation is subject to the punishments prescribed by law including shock probation in a county jail under Section 559.026, RSMo 1978.

However, it is our view that such a technical reading of the statutes results in a clear inequity in the treatment of juvenile offenders in that a juvenile offender who is charged with a felony violation in juvenile court would be protected from shock probation, see In re L.L.W., 626 S.W.2d 261, 263 (Mo. App. 1981), but a lesser traffic offender would be subject to shock probation. We do not believe that the legislature intended such a result and we are doubtful that an appellate court would condone the use of shock probation in such circumstances. Accordingly we conclude, in the premises, that such jail time should not be given to persons who are sixteen years of age.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

April 11, 1986

OPINION LETTER NO. 21-86

FILED
21

The Honorable James R. Strong
Senator, District 6
State Capitol Building, Room 225
Jefferson City, Missouri 65101

Dear Senator Strong:

This opinion is in response to your questions asking:

> Can a television station producing a program under contract with the Lottery Commission exclude live coverage of the program by other media representatives?
>
> Is the two minute program by KCTV an extension of the function of the Lottery Commission?
>
> Does the Joint Committee on Administrative Rules have any authority to review guidelines issued by a non-governmental entity which is acting as an agent of the Lottery Commission?

It is my understanding that the above questions have arisen as a result of the Lottery "Jackpot Spin" which is the method for the selection of a grand prize winner in the Lottery's Instant Game. Briefly stated, the Lottery selects "finalists" for the Jackpot drawing by selecting at random, names submitted on winning entry tickets. These individuals come to Kansas City where they spin a wheel containing 100 positions. The positions contain prizes ranging from $1,000 to the Jackpot prize. Each "finalist" wins the amount of the prize shown at the position in which the ball rests at the completion of the spinning of the wheel.

It is our further understanding that the Lottery Commission has contracted with the consortium of television stations headed by KCTV, Channel 5, in Kansas City. This contract purportedly grants exclusive broadcast rights to these stations in return for production costs, air time, and promotion of the drawing. The drawing is conducted at television station KCPT, Channel 19, in Missouri. The program is filmed by both the lottery and KCTV, Channel 5, and is later broadcast in an edited version by all of the consortium stations. The Jackpot wheel is owned by the State Lottery Commission and the Lottery Commission is in charge of its security throughout. The drawing is observed by auditors who have contracted with the Lottery in order to ensure the fairness of the "drawing". Prizes won by the contestants are paid by the Missouri State Lottery through normal state procedures from the State Lottery Fund. It is my understanding that relying on this exclusive contract Channel 5 has excluded only television cameras from the KCPT studios.

The question has been raised as to whether the Jackpot spin or drawing comes under the provisions of the Sunshine Law, Chapter 610 as amended. Section 610.010(3), RSMo Supp. 1984, defines "public meeting" as follows:

> [A]ny meeting of public governmental body subject to this act at which any public business is discussed, decided, or public policy formulated, but shall not include an informal gathering of members of a governmental body for ministerial or social purposes when there is no intent to avoid the purposes of this chapter;

The Jackpot drawing is simply a ministerial function of the Lottery Commission with, generally, no members of the Commission present for any public meeting purpose. Accordingly, we believe that it is clear that the provisions of the Sunshine Law have no application to the situation you present. While not violating the "letter" of the law, the Lottery Commission will have to make the determination as to whether or not the media availability policy related to this contract is within the "spirit" of the Open Meetings Law.

The apparent pertinent question is whether the Lottery Commission has authority to enter into a contract such as described. Article III, Section 39(b) 5, Missouri Constitution, indicates that the Lottery Commission has implicit authority to advertise subject to certain limitations. Section 313.230(1)(1), RSMo Supp. 1985, says in

part that the Commission may regulate "such other matters necessary or desirable for the efficient and economical operation and administration of the lottery ..." Advertising is also mentioned in Section 313.335, RSMo Supp. 1985. Clearly the spinning of the wheel which is permitted under 12 CSR 40-80.060 and 12 CSR 40-80.070 is advertising. This advertising is subject to a competitive bidding process. Thus there appears to be authority for the Commission to advertise to promote the lottery as a necessary adjunct to the power to contract through a public bidding process even though the contract involves the granting of exclusive broadcast rights to a certain station. The Lottery Commission advises that this contract promotes the efficient and economical operation and administration of the lottery.

While we believe that such contract is supported in law, this office is extremely concerned with the administration of this contract and its implementation by the parties. Not one day goes by without the issue concerning the propriety of not only the contract but the implementation of the contract being a matter of public notoriety.

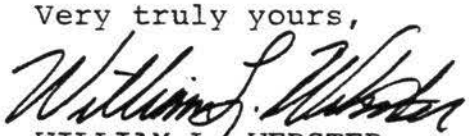
What appears to have happened is that a program for raising money is beginning to take on many questionable aspects under the guise of authority to enter into an exclusive contract. The Lottery Commission has lost sight of the will of the people under the constitutional provision that a percentage of the lottery money was set aside for administration and expense. This of course includes advertising. There certainly was no indication that proceeds from such contracts as this were part of the proceeds of the lottery which were contemplated to be divided up pursuant to the constitutional provision. Thus the Lottery Commission has creatively and perhaps with appropriate business judgment sought ways to reduce the expense but unfortunately has created confusion, threats of legal action and an apparent lack of control over the party with whom they have contracted.

The Lottery Commission should consider the needs of the people for information imparted through media which does not share an exclusive right and to the extent inequities exist remedy those inequities. There is no desire on the part of this office to support matters which impinge on the freedom of the press. However, we must candidly admit that the lottery program is unique and yet its uniqueness should not be used as an excuse to limit the freedom of the press to access in any respect.

Clearly the contract will be renewable shortly. We believe, if all interests can bear with the present circumstances and no further controversial situations arise, that with the assistance of this office matters as suggested by your opinion request can be resolved in a professional and appropriate manner considering the dictates of the people through the Missouri Constitution under Article III, Section 39(b) and attendant legislation. Certainly the Missouri legislature will have an opportunity to consider fully the views of all interested parties and make appropriate changes which are consistent with the constitutional dictates in the event the Lottery Commission is unable or unwilling to do so. This office stands ready to assist in advising on this matter.

Finally, your last question asks whether the Joint Committee on Administrative Rules has any authority to review guidelines issued by non-governmental entities acting as agents for state governmental bodies. The Joint Committee on Administrative Rules is created by Section 536.037, RSMo 1978. The Committee must approve the Lottery Commission's rules before those rules are effective, under Section 313.220, RSMo Supp. 1985. However, the authority of the Joint Committee on Administrative Rules is to review rules of an agency and the guidelines of non-governmental organizations (such as a television station), even though acting on behalf of the state agency, do not appear to be subject to the review of the Joint Committee. See Section 536.010(1), RSMo 1978, which limits the definition of "agency" to any administrative officer or body existing under the Constitution or by law and authorized by law or the Constitution to make rules or to adjudicate contested cases. Therefore, we conclude that the guidelines of KCTV would not be subject to review by the Joint Committee on Administrative Rules.

Very truly yours,



WILLIAM L. WEBSTER
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
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April 25, 1986

OPINION LETTER No. 23-86

Charles E. Kruse, Director
Missouri Department of Agriculture
1616 Missouri Boulevard
Jefferson City, Missouri 65101

FILED
23

Dear Mr. Kruse:

This letter is issued in response to the following questions:

> 1. In the event that a State [Beef Merchandising] Council is established, is the Missouri Department of Agriculture required by law to collect the account for fees payable to the Cattlemen's Beef Promotion and Research Board?
>
> 2. Should the Department of Agriculture pay refunds to the producer requesting same, pursuant to Section 275.360, RSMo, or to the Cattlemen's Beef Promotion and Research Board, pursuant to 7 U.S.C. 2901-2918, amendment Section 5 (8) (C)?

Section 275.350.1, RSMo 1978, provides:

> 1. Any fee imposed under the commodity merchandising program shall be collected by the director whether directly from the producers or indirectly from th handlers or processors as stipulated by the provision of the commodity merchandising program. [Emphasis added.]

7 U.S.C. Section 2904(8)(A), provides:

> The order shall provide that each person making payment to a producer for cattle purchased from the producer shall, in the manner prescribed by the order, collect an assessment and remit the assessment to the Board. The Board shall use qualified State beef councils to collect such assessments. [Emphasis added.]

Section 275.360, RSMo 1978, provides:

> 1. Any producer or grower may, by the use of forms provided by the director, have the fee paid and all future fees paid or collected from him pursuant to sections 275.300 to 275.370 refunded to him, provided such request for refund is in the office of the director within sixty days following the payment of such fee. . . .

7 U.S.C. Section 2904(8)(C), provides in pertinent part:

> The rate of assessment prescribed by the order shall be one dollar per head of cattle, or the equivalent thereof in the case of imported beef and beef products. A producer who can establish that the producer is participating in a program of an established qualified State beef council shall receive credit, in determining the assessment due from such producer, for contributions to such program of up to 50 cents per head of cattle or the equivalent thereof. . . .

Section 275.350, RSMo 1978, provides for the collection by the Director of fees imposed under the commodity merchandising program. This section does not authorize the Director to collect fees for or on behalf of any third party which do not benefit the program established under Chapter 275, RSMo.

Under 7 U.S.C. Section 2904(8)(A), creating the corresponding federal beef promotion program, assessments are to be collected from beef producers and remitted to the Cattlemen's Beef Promotion and Research Board by qualified state beef councils. The term "qualified state beef council" is defined in 7 U.S.C. Section 2902(14) as a promotion entity which is authorized under state statute, receives voluntary contributions, and is recognized by the Board.

There is no apparent conflict between these provisions of state and federal law which would require a different interpretation than may be arrived at by a reading of each law separately. The federal law makes no demand upon the Director which affects his duty to collect fees under the state program, nor does collection of the federal assessments by the qualified state beef council interfere with collection of such state program fees. Accordingly, the Director is required to collect only the state commodity merchandising program fees, and is not empowered or required to collect the federal assessments.

Section 275.360, RSMo 1978, provides for a refund to producers of fees paid into the Commodity Council Merchandising Fund, upon timely request therefor. There is nothing in the federal statute that prevents or interferes with the Director's compliance with the state refund provisions.

Missouri's qualified state beef council(s), however, may have some difficulty in carrying out the duty of collecting assessments. The federal statute specifies collection of an assessment of one dollar per head, but authorizes a credit of up to fifty cents per head if the producer participates in a state program. A qualified state beef council would be required to remit to the Board one dollar per head less any amount up to fifty cents per head paid as fees to the state program.

If a producer requests a refund of state fees, thereby withdrawing participation from the state program, the qualified state beef council would appear to be responsible for collecting and paying to the Board an amount equal to that refunded under the state commodity merchandising program. This follows from the requirement in 7 U.S.C. Section 2904(8)(C) which specifies a one-dollar-per-head assessment in the absence of participation in a state program. Cumbersome as collection from individual producers may prove to be, there is no statutory authority for the Director to pay these refunds directly to the qualified state beef council or any party but the producer originally paying same.

We conclude that the Director is not authorized to collect federal beef promotion assessments. The Director, furthermore, should pay refunds to producers, upon timely request therefor.

Charles E. Kruse, Director

The foregoing opinion letter, which I hereby approve, was prepared by my assistant, Kent Barta.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

ATTORNEY GENERAL OF MISSOURI

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April 28, 1986

OPINION LETTER NO. 24-86

Richard Rice, Director
Department of Public Safety
Post Office Box 749
Jefferson City, Missouri 65102

FILED
24

Dear Director Rice:

This letter is in response to your question asking what constitutes an "investigation" under Section 43.250, RSMo Supp 1984. Section 43.250 states:

> Every law enforcement officer who investigates a vehicle accident resulting in injury to or death of a person, or total property damage to an apparent extent of five hundred dollars or more to one person, or who otherwise prepares a written report as a result of an investigation either at the time of and at the scene of the accident or thereafter by interviewing the participants or witnesses, shall forward a written report of such accident to the superintendent of the Missouri state highway patrol within ten days after his investigation of the accident, except that upon the approval of the superintendent of the Missouri state highway patrol the report may be forwarded at a time and/or in a form other than as required in this section.

You also ask if the following procedure is in compliance with that statute:

> If the accident involves a fatality or injury or property damage requiring the vehicle to be towed, then a report is filled out and forwarded to the Missouri State Highway Patrol. If a property damage

> accident does not require a tow, regardless of the apparent $500 damage to the vehicles, no report is filled out, and the responding officer provides the persons involved an Exchange of Information Form.

A review of Missouri case law does not disclose any case in which a court has defined the term "investigation". Under the rules of statutory interpretation, however, the legislature is presumed to have intended every word to have its plain and common meaning. Kolocotronis v. Ritterbusch, 667 S.W.2d 430, 434 (Mo. App., W.D. 1984); Sermchief v. Gonzales, 660 S.W.2d 683, 688 (Mo. banc 1983). Webster's New World Dictionary (2nd ed.) defines "investigate" as "to search into so as to learn the facts; inquire into systematically...." In State v. Taylor, 673 P.2d 1140 (Kan. 1983), the Kansas Supreme Court noted that in performing an investigation "police officers must obtain necessary information from individuals...." Id. at 1144. An appellate court in California interpreted the term investigation in a California statute to mean "a patient inquiry into, and examination of all reasonably available facts...." People v. One 1941 Chevrolet Coupe, 248 P.2d 786, 789 (Cal. App., (1952).

It seems clear, therefore, that an "investigation" is not determined by the results of an inquiry, but rather by the fact that an inquiry was made. It is the gathering of information by an office to determine whether injury occurred or the extent of property damage that makes an investigation and not what the investigation reveals. In other words, when a law enforcement officer takes action to gather information about an accident, either through arriving at the accident scene or talking to witnesses or the participants, that officer is investigating that accident regardless of the extent of injury or damage disclosed.

Section 43.250, however, does not require a report be submitted for all investigations. Instead the Missouri legislature has established those accidents involving injury or $500 in property damage as the reporting criteria. The statutory criteria does not use a "tow-away" threshold as a basis for when an accident report must be filed. The express mention of one thing in a statute implies the exclusion of all others, Harrison v. MFA Mutual Insurance Company, 607 S.W.2d 137, 146 (Mo. banc 1980), and it is rational to assume that the legislature did not intend to permit a "tow-away" criteria.

For this reason the answer to your second inquiry is that the "tow-away" criteria set out above does not comply with Section 43.250. The statute is very specific in its requirement

when an accident report must be filed. A report shall be filed in (1) cases involving injury, death or "total property damage to an apparent extent of five hundred dollars or more to one person," or (2) when an officer "otherwise prepares a written report as a result of an investigation." An officer may choose to prepare a report for accidents that do not involve injury or $500 in property damage, but no discretion is permitted when injury, death or $500 in property damage to one person is apparent. Where a statute limits the doing of a particular thing in a prescribed manner, it necessarily includes in the power granted the negative that it cannot be otherwise done. State v. County of Camden, 394 S.W.2d 71, 77 (Mo. App., Sp. D. 1965).

We conclude that a law enforcement officer "investigates" an accident under Section 43.250, RSMo, when he or she makes an inquiry into the facts relevant to an accident, regardless of what that inquiry discloses. If upon investigation, the officer determines that death, injury or apparent property damage of $500 or more to one person has occurred, Section 43.250, RSMo. requires that the officer submit an accident report to the Missouri State Highway Patrol regardless of whether any vehicle is or is not towed from the accident scene.

Very truly yours,

William L. Webster

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April 28, 1986

OPINION LETTER NO. 25-86

The Honorable Douglas Harpool
Representative, District 134
State Capitol Building
Jefferson City, Missouri 65101

FILED
25

Dear Representative Harpool:

This letter is in response to your questions asking:

1, May a school board and superintendent make a valid contract for two years specifying the first year's salary, but not specifying the second year's salary?

2. If such a contract is valid, may the school board and the superintendent, after the expiration of the first year, make a valid second contract which again specifies the first year's salary, but does not specify the second year's salary?

Your opinion request concerns two contracts between a school district located in a third class county and its superintendent.

The first contract, dated January 10, 1983, was for the period beginning July 1, 1983, and ending June 30, 1985. There is no express provision allowing for an early termination of the agreement. This contract states in part:

> (A) The annual salary for the first year beginning July 1, 1983 shall be $38,468.00 and shall be paid monthly in twelve equal installments in accordance with Board policy.
>
> (B) The annual salary for the second year beginning July 1, 1984 shall be $_____

> and shall be paid monthly in twelve equal installments, indexed to the teachers [sic] salary schedule and approved Annually [sic] by the Board of Education.

The second contract, dated January 9, 1984, was for a period beginning July 1, 1984, and ending June 30, 1986. There is no express provision allowing for an early termination of the agreement. This contract states in part:

> (A) The annual salary for the first year beginning July 1, 1984 shall be $41,574.00 and shall be paid monthly in twelve equal installments in accordance with Board policy.
>
> (B) The annual salary for the second year beginning July 1, 1985 shall be $_____ and shall be paid monthly in twelve equal installments, indexed to the teachers [sic] salary schedule and approved Annually [sic] by the Board of Education.

No part of these contracts specifies an indexing formula that allows one to calculate the second year's salary.

I.

Unspecified Second Year Salary

Section 168.201, RSMo 1978, states:

> The Board of education in all districts except metropolitan districts may employ and contract with a superintendent for a term not to exceed three years from the time of making the contract and may employ such other servants and agents as it deems necessary, and prescribe their powers, duties, compensation and term of office or employment which shall not exceed three years. It shall provide and keep a corporate seal.

Section 432.070, RSMo 1978, states:

> No county, city, town, village, school township, school district or other municipal corporation shall make any contract, unless the same shall be within the scope of its

> powers or be expressly authorized by law, nor unless such contract be made upon a consideration wholly to be performed or executed subsequent to the making of the contract; and such contract, including the consideration, shall be in writing and dated when made, and shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed and authorized in writing.

In Missouri Attorney General Opinion No. 25, Keyes, 1978, copy enclosed, a school district agreed to pay its superintendent "an amount to be determined by the Board to be paid in the second and third years, but not less than $36,500, . . .". Id., at 1. Relying in part on Bride v. City of Slater, 263 S.W.2d 22 (Mo. 1953), this office found that the second- and third-year provisions in the contract in question were void, because they did not comply with Section 432.070, RSMo 1969, as an essential term of the contract for the second and third years was unspecified and was left indefinite.

Following our 1978 opinion, we conclude that, although the contracts in question purport to have two-year terms, in actuality these contracts are only one-year contracts; the provisions for a second year are void because an essential term of the contract for the second year is missing. Any attempt to enforce the "second year" provisions of these contracts would run afoul of Section 432.070, RSMo 1978.

II.

The Second Contract

As previously stated, in the second year of the first contract, the parties agreed to a new two-year contract. This would be peculiar but for our conclusion above. As the contracts in question were actually one-year contracts, although they purported to be two-year contracts, there is no overlapping of contracts here.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

Enclosure

CONTRACTS:
COOPERATIVE AGREEMENTS:
COUNTIES:

Counties may cooperate with each other to jointly purchase metal culverts, connecting bands and grader blades, which are to be used for the individual needs of such counties; counties may solicit bids for their combined purchasing requirements of metal culverts, connecting bands and grader blades and purchase from the lowest and best bidder without individually inviting bids and comparing the bids from the individual invitation to those received from the combined bidding process; and, a combined competitive bidding procedure which allows the participating counties to decide what to invite bids on in regard to their own individual needs and allows them to accept or reject the bids received does not involve the improper delegation of the counties' executive duties.

April 28, 1986

OPINION NO. 28-86

Hon. James R. Strong
State Senator
State Capitol Building, Room 225
Jefferson City, Missouri 65101

FILED
28

Dear Senator Strong:

You have requested an opinion as follows:

> "(a) May two or more counties cooperate with each other to jointly purchase metal culverts, connecting bands and grader blades, not to be used for a facility or service common to such counties, but rather to be used for the individual needs of such counties.
>
> "(b) May two or more counties solicit bids for their combined purchasing requirements of metal culverts, connecting bands and grader blades and purchase from the lowest and best bidder based upon their combined purchase requirements without a determination of what the lowest and best bid is for their individual purchase requirements?
>
> "(c) May a county delegate to Missouri Associate [sic] of Councils of Governments ("MACOG") the responsibility for soliciting bids, selecting the lowest and best bidder, and entering into a contract for purchase of metal culverts, connecting bands and grader blades, the purchase of which is governed by R.S.Mo. § 50.660 (1986 Supp.), Rules Gov-

erning Contracts."

These questions arise from a cooperative procedure utilized by certain counties for issuing invitations to bid for equipment and supplies to be purchased and used by the counties. The factual description of this procedure has been obtained from your opinion request and from a letter dated March 26, 1986, authored by the executive director of the Missouri Association of Councils of Government (MACOG) which was sent in response to an inquiry from this office.

MACOG has provided a succinct description of the cooperative bidding process as follows:

> "Because of the fact that several of the regional councils or regional planning commission have been successful in working in cooperative ventures for their local units of government and, in turn, saving tax dollars, there was an interest expressed at having our statewide association put together a bid package for metal culverts and roadgrader blades as a means of assisting local government save money.
>
> * * *
>
> "Basically what has occurred is that the individual regional councils have asked MACOG to put together a package bid, and the bids have come in on a per-region basis on an all or nothing basis for supplying the materials. We sent information out to the individual counties concerning the bidding process, and those that wished to have materials bid filled out a simple form telling us the quantities that they wanted of either the roadgrader blades or culverts, bands, and bolts and that kind of thing. The individual regional councils then compiled a comprehensive listing from the local municipal and county governments that chose to have bidding done this way, and it was sent to our MACOG office which then calculated the statewide needs for various types of grader blades and different sizes of culverts, etc., and issued a bid request. Subsequent to this, the information on the bids has been sent back to the regional councils which have, in turn, provided the information to the local units of government

> so that they can make a decision as to whether they are going to participate in the program and accept the bids or not."

The regional councils mentioned are those established under § 251.150 et seq., RSMo 1978. MACOG has been incorporated in Missouri as a general not-for-profit corporation. Its articles of incorporation establish its purpose as follows:

> "To promote, advance and assist the regional planning commissions and councils of government in the state of Missouri and all other legal powers permitted General Not for Profit Corporations."

More specifically, its purposes are spelled out in Article II of its by-laws:

> "2.1 The purpose of the corporation shall be to promote the interests of local governments through:
>
> 2.1.1 The identification and evaluation of mutual areawide problems requiring statewide solutions;
>
> 2.1.2 To assist in the development of intergovernmental activities;
>
> 2.1.3 To participate in and encourage local governments to seek solutions to areawide problems through multi-jurisdictional action;
>
> 2.1.3 To undertake other lawful activities pursuant to provisions of these by-laws and permitted by RSMo chapter 355."

According to Article VII of its by-laws, MACOG has a board of directors which is comprised of one elected official designated from each member regional planning commission or council of government. Each member of the board has one vote on all matters. The board also elects from their number for two-year terms a president, vice-president, and combination secretary/treasurer.

You have submitted with your request an Invitation to Bid dated January 12, 1986, which is for "bids to supply corrugated Metal Culverts and Connecting Bands as per the attached specifications in this bid." Attached to the Invitation are specifications listing the individual county, the number of

culverts for each county along with the size, gauge, type and drop ship location for each county. The same information is given county by county for the connecting bands. There is also a table giving the total number of each type of culvert and connecting band.

According to the Invitation the bidder must sign and agree to the following:

> "The Bidder hereby agrees to furnish items and/or services, at the prices quoted, pursuant to all requirements and specifications contained in this document, upon either the receipt of an authorized Purchase Order from MACOG or when this document is countersigned by MACOG as a binding Contract. The Bidder further agrees that the language of this document shall govern in the event of a conflict with His or Her Bid."

The Invitation directs that the sealed bids must be received by MACOG by a certain time and date. The General Requirements page included in the Invitation states in relevant part as follows:

> "Billing shall be in the form of a statement accompanied by copies of the delivery receipts for materials. A copy of the delivery receipt shall also be provided to the Agency representative on receipt of the materials. Each governmental entity will be billed separately.
>
> The bid will be awarded on an all or none basis by region except where indicated.
>
> The counties/cities reserve the right to reject any or all bids."

A February 7, 1986, Addendum to the bidders states in paragraph 4 as follows:

> "4. While bids are being requested on the regional basis, the delivery and billing point will be with each individual county. The regional planning commission will forward verification of the order from the counties to the vendor."

Your questions concern the authority of the counties to participate in such a competitive bidding process under the

authority of Article VI, section 16, Missouri Constitution and the statutes implementing that section, §§ 70.210 et seq.

> "Any municipality or political subdivision of this state may contract and cooperate with other municipalities or political subdivisions thereof, or with other states or their municipalities or political subdivisions, or with the United States, for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service, in the manner provided by law." Article VI, section 16, Missouri Constitution

> "Any municipality or political subdivision of this state, as herein defined, may contract and cooperate with any other municipality or political subdivision, or with an elective or appointive official thereof, . . . or with any private person, firm, association or corporation, for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service; provided, that the subject and purposes of any such contract or cooperative action made and entered into by such municipality or political subdivision shall be within the scope of the powers of such municipality or political subdivision." § 70.220, RSMo 1978.

Question (a):

> "(a) May two or more counties cooperate with each other to jointly purchase metal culverts, connecting bands and grader blades, not to be used for a facility or service common to such counties, but rather to be used for the individual needs of such counties."

Two or more counties may cooperate with each other in the manner described in the MACOG bidding process for purchase of equipment or materials to be used for the individual needs of each of the counties. Section 70.220, RSMo 1978, allows such cooperative activity if (1) the county is a political subdivision as defined in § 70.210(2), RSMo 1978; (2) the cooperation is with an entity described in § 70.220, such as another political subdivision or any private corporation; (3) the object of the contract or cooperative agreement is as

designated in § 70.220, such as, "for a common service"; and, (4) the subject and purposes of the contract or cooperative activity are within the scope of the powers of the counties involved. Your opinion request focuses on whether requirement (4) is met. On page 7 of your request you state as follows:

> "Because their [the counties'] cooperative activity involved herein is not for the furtherance of a common service or facility, but is rather for the procurement of materials for the individual participating counties, it appears that such a cooperative activity may not be authorized by Missouri law."

The common service here is the provision of the bidding process. Simply because the materials eventually obtained through that process are not used in common by all the counties does not matter. The bidding process itself is the common service. The provision of a competitive bidding process is not only within the scope of the powers of the counties but is required. Section 50.660, RSMo Supp. 1984.

Question (b):

> "(b) May two or more counties solicit bids for their combined purchasing requirements of metal culverts, connecting bands and grader blades and purchase from the lowest and best bidder based upon their combined purchase requirements without a determination of what the lowest and best bid is for their individual purchase requirements?"

If a county enters a cooperative bidding procedure as described above, it need not on its own advertise and request for bids in order to get a comparison between the responses to its request and those to the invitation put out by MACOG. If there is a statutory section separate from § 50.660 allowing a county to engage in competitive bidding in a manner different from § 50.660, the county is allowed the option of choosing either of the two methods provided by the legislation. This issue was resolved in Opinion Letter No. 169 (1974), copy enclosed, when Cole County inquired of this office as to whether a county which has an agreement with the state of Missouri under the State-Local Technical Services Act, §§ 67.330 through 67.390, RSMo, for the purchase of supplies and equipment must advertise for bids for the same materials in the manner spelled out in § 50.760, RSMo (this section contains competitive bid requirements substantially similar to those in § 50.660). This

office opined that such an arrangement was legally permissible.

> "Under Section 67.360, it was the intent of the General Assembly to allow centralized procurement of equipment and the like required by such political subdivisions through the state agency. When such political subdivision has entered into such an agreement with the state agency and has complied with the requirements for such purchases, Section 50.760 is not applicable and purchases may be made pursuant to Section 67.360 without bids." Opinion Letter No. 169 (1974), page 2.

The reasoning of that opinion letter can be applied to the instant situation in which counties have formed together with MACOG for the common service of soliciting bids under § 70.220. The benefits of such joint purchasing are well known in this day and age. The policy of the General Assembly is clear in regard to encouraging economies in local government through cooperative action. In a case concerning § 70.220, the Missouri supreme court held:

> "The purpose of the constitutional provision [Article VI, Section 16] is to enable municipalities and political subdivisions to effect economies and facilitate the performance of their selected public functions although actual consolidation of the governmental agencies is not feasible." [Emphasis added] School District of Kansas City v. Kansas City, 382 S.W.2d 688, 692 (Mo. banc 1962), accord, Cape Motor Lodge, Inc. v. City of Cape Girardeau, No. 67507 (Mo. banc March 25, 1986), Slip Opinion at page 9.

Just as emphatic is the General Assembly's statement of policy in § 67.330, RSMo 1978, of the State-Local Technical Services Act:

> "It is hereby declared the policy of the general assembly of the state of Missouri that all forms of contractual and cooperative services that promote the economy and efficiency of operations of local government should be encouraged. . . ." Section 67.330, RSMo 1978.

The counties participating in the MACOG arrangement have chosen a manner authorized by § 70.220 to fulfill the

requirement to have competitive bidding. They do not need to employ a separate and individualized bidding procedure in addition thereto for the items bid through MACOG.

Question (c):

> "(c) May a county delegate to Missouri Associate [sic] of Councils of Governments ("MACOG") the responsibility for soliciting bids, selecting the lowest and best bidder, and entering into a contract for purchase of metal culverts, connecting bands and grader blades, the purchase of which is governed by R.S.Mo. § 50.660 (1986 Supp.), Rules Governing Contracts."

Your question raises the issue of whether certain nondelegable executive functions of the counties have in fact been delegated to MACOG by the cooperative bidding procedures. The facts, however, show that such is not the case. As the previously quoted material from MACOG's March 26, 1986, letter shows, the counties review the bidding process before agreeing to participate. All bids received in response to the Invitation to Bid are then sent to the counties by MACOG. Each county decides on its own whether or not to accept the bids. As its says in the General Requirements section of the Invitation to Bid, "The counties/cities reserve the right to reject any or all bids." The individual counties exercise their executive responsibilities in determining what items to invite bids on and whether to accept the bids which are submitted.

CONCLUSION

It is the opinion of this office that:

(a) Counties may cooperate with each other to jointly purchase metal culverts, connecting bands and grader blades, which are to be used for the individual needs of such counties;

(b) Counties may solicit bids for their combined purchasing requirements of metal culverts, connecting bands and grader blades and purchase from the lowest and best bidder without individually inviting bids and comparing the bids from the individual invitation to those received from the combined bidding process; and,

(c) A combined competitive bidding procedure which allows the participating counties to decide what to invite bids on in regard to their own individual needs and allows them to accept or reject the bids received does not involve the improper delegation of the counties' executive duties.

Hon. James R. Strong

The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul R. Otto.

Very truly yours,

WILLIAM L. WEBSTER

Enclosure: Opinion Letter No. 169 (1974)

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
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June 24, 1986

OPINION LETTER NO. 30-86

FILED
30

The Honorable Karen McCarthy
Representative, District 40
1111 Valentine Road
Kansas City, Missouri 64111

Dear Representative McCarthy:

This letter is in response to your questions asking:

1. Are periodic payments of Missouri lottery prize winnings subject to state income and local earnings taxes after July 1, 1988 if the original prizes were won prior to July 1, 1988?

2. Are periodic payments of Missouri lottery prize winnings subject to state income tax withholding after July 1, 1988 if the original prizes were won prior to July 1, 1988?

Section 313.320.3, RSMo Supp. 1985, states in part:

> No state income tax or local earnings tax shall be imposed upon any lottery game prizes which accumulate to an amount of less than six hundred dollars during a prize winner's tax year. Beginning July 1, 1988, all winnings or periodic payments made because of winning six hundred dollars or more shall be subject to state income and local earnings taxes. Beginning July 1, 1988, the state of Missouri shall withhold for state income tax purposes from a lottery game prize or periodic payment of six hundred dollars or more an amount equal to four percent of the prize.

The Honorable Karen McCarthy

We have carefully studied the above language and, frankly, we find it confusing and difficult to interpret. It is clear, however, that periodic payments made after July 1, 1988, because of Missouri lottery winnings of six hundred dollars ($600.00) or more prior to July 1, 1988, are subject to state income and local earnings taxes.

The answers to other questions regarding the effect of this language are not so clear. Therefore, we recommend that the General Assembly consider enacting legislation more definitely expressing its intent with respect to the taxation of lottery winnings.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
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March 31, 1986

OPINION LETTER NO. 32-86

FILED
32

The Honorable Lester Patterson
Representative, District 48
State Capitol Building, Room 408A
Jefferson City, Missouri 65101

Dear Representative Patterson:

This letter is in response to your request for an opinion of this office regarding the authority of the Missouri Real Estate Commission under Section 339.120, RSMo Supp. 1984. The question posed is:

> Has the Missouri Real Estate Commission exceeded its authority under section 339.120, RSMo Supp. 1984, by allowing real estate companies to conduct continuing education courses and declare that its agents have successfully passed the courses, furthermore, do the rules made by the Missouri Real Estate Commission allowing the real estate companies to teach their own courses present an equal protection problem in that small real estate companies cannot compete effectively with large real estate companies in the area of continuing education for real estate agents?

Section 339.120, RSMo Supp. 1984, is the statutory provision creating the Missouri Real Estate Commission and defining qualifications of members, terms of and compensation for appointment, and the powers and duties of the Commission. The Commission has authority to:

> [D]o all things necessary and convenient for carrying into effect the provisions of this chapter, and may from time to time promulgate necessary rules and regulations compatible with the provisions of this chapter.

The Honorable Lester Patterson

Section 339.040.7, RSMo Supp. 1984, states:

> The commission shall require every active broker, salesperson, officer or partner to present upon license renewal evidence that during the two years preceding he has completed twelve hours of real estate instruction in courses approved by the commission. The commission may, by rule and regulation, provide for individual waiver of this requirement.

4 CSR 250-10.010 through 4 CSR 250-10.080 set forth rules and regulations on continuing education which have been promulgated by the Commission. 4 CSR 250-10.020 states:

> All continuing education courses and instructors must be sponsored by a person, institution or organization who is responsible for the formation and administration of courses.

Under the statute, the legislature allowed the Commission to designate which entities are eligible to provide continuing education. Under 4 CSR 250-10.020, individuals, schools, and corporations are eligible to sponsor continuing education. The remaining regulations on continuing education address course approval, instructor approval, physical facilities, advertising, records, and the investigation and review. 4 CSR 250-10.030-10.080. None of these sections differentiate between courses sponsored by an individual, corporation, or school. All entities must meet the same criteria in order for a student to receive continuing education credit.

4 CSR 250-10.070 states:

> (1) Each licensee shall be responsible for providing the commission, within thirty (30) days following the completion of a course, a certificate of course completion in a form prescribed by the commission.
>
> (2) At the close of any continuing education course, the sponsor shall issue to each licensee who has satisfactorily completed the course a certificate of course completion in duplicate in a form prescribed by the commission.

> (3) Within ten (10) days of the completion of the course, the sponsor shall submit to the commission, on a form prescribed by the commission, a list of those licensees who have satisfactorily completed the course, with their license numbers. The commission may, at its discretion, extend the ten (10)-day period.
>
> (4) Sponsors of continuing education courses shall maintain, for a period of not less than three (3) years, complete records of course attendance and student certification and shall supply duplicate certificates to licensees upon request. A reasonable charge may be made for such duplicate certificates.

Thus, the sponsor of a course is responsible for providing to the student a certificate of course completion at the close of the course. The licensees must then submit their certificates to the Commission within thirty days. This requirement applies to all entities which sponsor continuing education, whether they be individuals or large real estate companies. Furthermore, real estate companies do not declare that its agents have successfully passed the course since mere attendance is the only prerequisite to continuing education credit.

Clear statutory authority exists for the Real Esate Commission to promulgate rules and regulations to effectuate the intent of the legislature with regard to continuing education. Sections 339.040.7 and 339.120.1, RSMo Supp. 1984. The equal protection clause allows the State legislature wide discretion when creating classifications, precluding only those classifications without any reasonable basis, and therefore, arbitrary. City of St. Louis v. Liberman, 547 S.W.2d 452, 458 (Mo. Banc 1977). Furthermore, a legislative classification assailed on an equal protection ground is not rendered arbitrary or invidious merely because it is under-inclusive; there is no constitutional requirement that regulation must reach every class to which it might be applied or that the legislature must regulate all or none. Id.

The above-questioned regulatory scheme allows persons, institutions, and organizations to sponsor continuing education courses. Large real estate companies as well as small may sponsor courses. Nothing in the language of the legislation requires the Missouri Real Estate Commission to limit the

numbers or types of entities which may teach continuing education. Furthermore, all entities which are permitted to sponsor continuing education are treated the same and an equal protection challenge on that ground is, therefore, not warranted. State v. Ewing, 518 S.W.2d 643, 646 (Mo. 1975).

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

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April 28, 1986

OPINION LETTER NO. 34-86

The Honorable John T. Russell
Senator, District 33
State Capitol Building, Room 419
Jefferson City, Missouri 65101

FILED
34

Dear Senator Russell:

This letter is in response to your questions asking:

> 1) When a county overestimates its level of assessed valuation and sets levies on that anticipated valuation, is it lawful for political subdivisions to increase their tax levies to reflect the true valuation, thus producing substantially the same amount of tax revenue . . . [in] the previous year as allowed in section 137.073, RSMo?
>
> 2) Does the correction of errors in an estimated assessed valuation level constitute a "general reassessment" within the meaning of subdivision (1) of subsection 1 of section 137.073, RSMo, and if so, does the general reassessment thereby permit an upward revision of levies to reflect the true valuation and produce substantially the same amount of tax revenue as the previous year allowed in section 137.073, RSMo?

Our understanding is that a county installed a new computer system to aid with the general reassessment of property in 1985. Because "final" assessed valuation figures were not available prior to the 1985 tax-rate-setting deadlines, preliminary assessed valuation figures (which are referred to as "estimates" in your question) were used in calculating the tax rate rollback. These preliminary figures were found to contain substantial errors, which resulted in an

overestimation of the county's assessed valuation of millions of dollars. For purposes of this opinion, we will assume that the preliminary assessed valuation figures of the county in question was one hundred million dollars ($100,000,000.00). The 1985 tax rate rollback calculated upon that assessed valuation was forty-four cents ($.44) per one hundred dollars ($100.00) assessed valuation. The correct assessed valuation of the county amounted to eighty-seven million dollars ($87,000,000.00). If the correct assessed valuation would have been used, assume that the tax rate rollback would have been forty-six cents ($.46) per one hundred dollars ($100.00) assessed valuation.

I.

In essence, your first question asks if the "correct" tax rate of forty-six cents ($.46) can be substituted for the "incorrect" tax rate of forty-four cents ($.44), which was certified to be correct under Section 137.073.8, RSMo Supp. 1985. See also Section 137.290, RSMo 1978. We find no specific statutory procedure authorizing a political subdivision to correct the certification of its tax rate. While we find no statutory authorization for such change, the county may have an inherent right to correct is tax rates, even after the deadlines for setting tax rates. See Sections 67.110, RSMo Supp. 1984 (setting a September 1 tax-rate-setting deadline for political subdivisions other than counties), and 137.055, RSMo 1978 (setting a September 20 tax-rate-setting deadline for counties).

Section 137.073.6(1), RSMo Supp. 1985, provides in part: "In all political subdivisions except school districts, the tax rate ceiling established pursuant to this section shall not be exceeded in the year of the tax rate reduction or thereafter unless a higher tax rate is approved by a vote of the people. . . ." See also Section 137.073.7, RSMo Supp. 1985 (dealing with school districts). Section 137.073(4), RSMo Supp. 1985, defines the term "tax rate ceiling" as "a tax rate as reduced by the taxing authority to comply with the provisions of this section or when a court has determined the tax rate reduction. This is the maximum tax rate that may be levied in the year of tax rate reduction and in subsequent years, unless a higher tax rate ceiling is approved by voters of the political subdivision as provided in this section;". (Emphasis added.)

One can argue that the tax rate ceiling for the county in question is not the certified forty-four cent ($.44) levy but

the forty-six cent ($.46) levy, because compliance with the provisions of Section 137.073, RSMo Supp. 1985, would have yielded a forty-six cent ($.46) levy.

Accordingly, we conclude that plausible arguments can be made that the county in question could raise its general operating levy from forty-four cents ($.44) to forty-six cents ($.46); we recommend that if the county wishes to pursue this course of action, it should file a declaratory judgment action praying for the court to declare its right to increase its levy.

II.

The first part of the second question asks if the correction of errors in an estimated assessed valuation level can constitute a "general reassessment", as that term is defined in Section 137.073.1(1), RSMo Supp. 1985. We understand that the type of errors you are primarily concerned with are mathematical and caused by the introduction of a new computer system.

Section 137.073.1(1), RSMo Supp. 1985, states:

> 1. As used in this section, the following terms mean:
>
> (1) "General reassessment", changes in value, entered in the assessor's books, of a substantial portion of the parcels of real property within a county resulting wholly or partly from reappraisal of value or other actions of the assessor or county equalization body or ordered by the state tax commission or any court;

This definition of "general reassessment" contains the following elements: (1) Changes in value, entered in the assessor's books, (2) of a substantial portion of the parcels of real property within a county (3) resulting wholly or partly from reappraisal of value or other actions of the assessor or county equalization body or ordered by the state tax commission or any court.

We believe that the correction of 1985 computer errors to arrive at a corrected 1985 assessed valuation is not a change in 1986 values. The first element is missing.

Whether the computer errors are extensive enough to affect a substantial portion of the parcels of real property within a county is a factual matter which cannot be determined here.

Finally, we do not believe the correction of computer errors is a reappraisal of value or other action of the enumerated persons.

As we have determined that the correction of computer errors is not a "general reassessment" for purposes of Section 137.073.1(1), RSMo Supp. 1985, we do not need to answer the second part of your second question.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

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March 10, 1986

OPINION LETTER NO. 41-86

FILED
41

The Honorable Chris Kelly
Representative, District 26
State Capitol Building
Jefferson City, Missouri 65101

Dear Representative Kelly:

Recently you questioned the propriety of the use of merit system employees and of state property for the purposes of announcing candidacies for political office. We note that your opinion request provided very little factual information. Therefore, we inquired further of the Office of Administration as to the attendant circumstances which may have given rise to your inquiry.

The Office of Administration advised that the use of the front of the State Capitol Building and the use of the rotunda at the same time in the event of inclement weather had been reserved by a farm organization featuring the Reverend Jesse Jackson as speaker on February 11, 1986. After the Office of Administration received that request, U.S. Senatorial candidate Christopher S. Bond requested the use of the rotunda at the State Capitol Building at approximately the same time on the same day for his campaign announcement and speech on public issues. The Office of Administration asked Mr. Bond to use the Truman Building and principally the atrium area on the fourth floor. The atrium area, as well as the rotunda in the Capitol Building, are state-owned property and areas which are commonly open to the public. In the case of the farm rally with Reverend Jackson the Office of Administration, Division of Design and Construction, used its employees to set up the lectern and sound equipment. The same division of the Office of Administration set up the lectern and sound equipment for the Bond announcement and speech. As with the farm supporters the Bond supporters supplied banners and balloons for the occasion. Both events were open to the public and the farm supporters supplied anti-presidential banners and political paraphernalia.

Just as the Bond group had political figures on the podium, the farm rally group along with Jesse Jackson who has

been a candidate for national office had on the podium three Democratic congressional candidates, one representative of an unannounced Democratic candidate for U.S. Senator, and an unannounced Democratic U.S. senatorial candidate.

In both instances merit employees from the Office of Administration controlled the crowd and set up lecterns and sound systems compatible with the state electrical system and maintained the state property. And in both cases the purpose of using these employees was to avoid damage to state property and maintain a reasonable control over the activities, as well as generally maintaining state property. In both cases the purposes of the activities were public.

The Office of Administration further advises that neither the farm/Jackson rally nor the Bond group used state merit system employees for any campaign purposes. The Office of Administration said that the services for both groups were normal services involved with announcements and appearances of political candidates regardless of their political party such as in the case of John Glenn who was candidate for President of the United States, other congressional candidates and gubernatorial candidates who have appeared on public property in the state of Missouri in areas that are open to public access. The Office of Administration instructed its employees to perform the functions of maintaining state property by setting up the lecterns and sound system, controlling crowds and cleaning up afterwards in the ordinary course of their duties as employees of the state of Missouri. Obviously the purpose was to place reasonable restrictions for the use and maintenance of public property in areas open to the public.

The matter of use of public facilities has already been addressed in 1 CSR 30-4.020(5).

> Public use of public areas of state facilities is appropriate. Such use shall be carefully considered to insure that it does not interfere with the required functions and activities of the department/agency occupying a facility. However, cooperation with other governmental agencies for use of space, at times when it is not required for functions of the department/agency, is in the public interests. This cooperative effort improves facility utilization and overall cost effectiveness of state maintenance and operation expenditures. Public use (other than use by governmental agencies) of some state facilities, for public functions, may also be in the public interest. This is particularly true when other suitable facilities are not available in the

> community. The cost of non-official public functions cannot be supported with state appropriations. When such non-official public use occurs, the direct costs for utilities and security or other personnel will be computed and recovered from the using organization. Monies received for these direct costs shall be deposited and controlled in accordance with current statutes. Records shall be maintained for all such non-official public use. The records shall include date and time of use, organization, hourly rate and total amount collected and the date of transmittal for deposit. Transmittal for deposit shall be to the treasurer of the state of Missouri, unless statutory authority provides for other deposit designation and/or control for such collections.

Thus the Office of Administration had already in place an established policy of allowing speaking functions or what is characterized in the regulation as "public use" in defined public areas with reasonable restrictions.

As to the guiding legal principles, the U.S. Supreme Court has continually reminded that: " ... political belief and association constitute the core of those activities protected by the First Amendment. The First Amendment of the United States Constitution protects political associations, as well as political expression. The cases from the United States Supreme Court reflect a long-standing principle of a national commitment to the principle that debate on public issues should be uninhibited, robust and wide open." Elrod v. Burns, 427 U.S. 347, 356, 357, 49 L.Ed.2d, 547, 96 S. Ct. 2673 (1976).

"In a Republic where the people are sovereign the ability of the citizenry to make informed choices among candidates for office is essential for the identities of those who are elected will inevitably shape the course that we follow as a nation." See Buckley v. Valeo, 424 U.S.1, 14, 15, 466 L.Ed.2d, 659, 96 S. Ct. 612 (1976) also Monitor Patriot Co. v. Roy, 401 U.S. 265, 272, 28 L.Ed.2d, 35, 91 S. Ct., 621 (1971).

"(I)t can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." See Buckley v. Valeo and Monitor v. Roy, supra.

Quite obviously the constitutional right provided in the First Amendment of free speech touching on political issues is a protected right. The above activities appear not only to be

protected constitutionally but also to be considered within the definition of public purpose wherein the use of state property must be directed for a public purpose.

Your questions raise issues concerning denial of access or perhaps begs the question of whether a state may reasonably restrict access to public properties in areas open to public use generally. The use of state employees by the Office of Administration to set up lecterns and sound systems, control traffic and to clean up after such activities appear to be reasonable restrictions as recognized by the United States Supreme Court in the course of the state maintaining proper control over its property. Otherwise as a practical matter an event which is permissible by law and protected by the United States Constitution may result in chaos and even damage to or destruction of public property.

Your final question related to whether costs should be reimbursed as a matter of regulation or legislation within the guidelines of reasonableness as set out by the United States Supreme Court. As cited above, 1 CSR 30-4.020(5) addresses the issue of costs. We would point out however that our discussions with the Office of Administration reveal that costs have never been considered to be recovered whether it involved John Glenn, Jesse Jackson, gubernatorial debates in 1984 involving politicians from both major political parties or otherwise. The regulations certainly provide for recovery of costs pertaining to non-official public use. We recommend to the Commissioner of Administration that he take a very close look at the regulation and its enforcement despite the fact that it has been represented to us that the costs involved in the public use of the state facilities by the farm rally, the Bond rally, and other previous groups have been nominal in nature such as less than $100.00 per event.

We think it is also necessary to comment that public use of state facilities as outlined in the regulation appears to be consistent with the proposition discussed in the case of Widmar v. Vincent, 454 U.S. 263, 70 L.Ed. 440, 120 S. Ct. 269 (1981). In that case equal access of a religious group to a state university property which happened to be property of the University of Missouri at Kansas City was in question. The facilities were available for the activities of registered student groups. A registered religious group who once had permission was denied permission to use the property because it was "for purposes of religious worship or religious teaching".

In Widmar v. Vincent, supra, the United States Supreme Court said that the policy of the University of Missouri at Kansas City violated the fundamental principles of free speech. Having created the forum generally open for use by student groups, the University of Missouri at Kansas City in order to exclude from such forum based on religious content of

the group's intended speech must satisfy the standards of review appropriate to content based exclusion. The regulations to be valid must serve a compelling state interest and be narrowly drawn. In that case the court stated "The Constitution forbids a state to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place." See page 267 of the opinion. The court also recognized that the University of Missouri at Kansas City had the capacity to establish reasonable restrictions as to time, place and manner of use of state property for the exercise of free speech. Thus the Office of Administration may establish reasonable restrictions on time, place and manner of use of state property.

We believe the answers to your questions in light of the above-cited state regulation and supporting United States Supreme Court cases appear quite obvious. The State of Missouri has traditionally offered access to political candidates to make announcements and to officeholders to make speeches on political issues whether that candidate or officeholder is a Democrat, Republican or from some other political persuasion. Certainly the University of Missouri property, as well as public parks and schools, have been used for political campaigns and activities in the past. The longstanding policy of the state of Missouri apparently is reflected in great measure in 1 CSR 30-4.020(5). Additionally use of public property has already been addressed in the cases cited above and is generally commented on in 78 C.J.S. Schools, Section 259(b)(2), also in 81(a) C.J.S. States, Section 146, Use of Public Property.

Finally, in further response to your question we have concluded that a state merit employee working for the Office of Administration is not prohibited from carrying out his ordinary duties as directed by the Office of Administration even though those duties may include maintaining state property for political activity under the regulation 1 CSR 30-4.020(5). Such activities could include the announcement of candidacy for public office or addressing a farm rally or as in the case of John Glenn, announcements concerning running for the Presidency of the United States. Consequently we find no abuse by state merit system employees and further find that they acted appropriately in the premises in protecting and maintaining state facilities consistent with the numerous United States Supreme Court cases.

Nothing we have said above should be construed to mean that any group can use state or local public property at any time without abiding by reasonable restrictions as to

location, time, maintenance, and protection of the public property.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER

ATTORNEY GENERAL OF MISSOURI

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ATTORNEY GENERAL

P. O. Box 899
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April 1, 1986

NOTE: See SB 554 (1994) amending Section 610.100 which impacts answer to third question in this opinion.

OPINION LETTER NO. 42-86

Weldon W. Perry, Jr.
Prosecuting Attorney
Lafayette County
Post Office Box 59
Lexington, Missouri 64067

FILED
42

Dear Mr. Perry:

This letter is in response to your questions:

> Does Section 610.100, et.seq, RSMo., require that police investigative reports in felony and misdemeanor prosecutions be "closed" to public inspection in the following instances:
>
> (1) where a suspect is arrested but thereafter not charged with a criminal offense by the prosecuting attorney;
> (2) where a suspect is charged with a criminal offense by prosecuting attorney, but the charge is later nolle prosequed, dismissed, or suspended sentence is imposed;
> (3) where a suspect is identified but not arrested or charged in connection with the incident under investigation.

Section 610.100 et seq., RSMo Supp. 1984 is titled the Arrest Records Law. It is a segment of the "Sunshine Law" (Sections 610.010-.120, RSMo) which pertains to the definition and closure of public records. That chapter defines a public record as any record retained by or of any public governmental body, Section 610.010(4), RSMo Supp. 1984, and directs that such records remain open for public inspection, Section

610.015, RSMo 1978, subject to certain enumerated exceptions. Some "exceptions" which require closure of records are contained in the Arrest Records Law about which you inquire. The issue you raise, therefore, is whether police investigative reports are considered public records under the "Sunshine Law" and if so, whether there exists any exception in the Arrest Records Law authorizing or requiring their closure.

In Hyde v. City of Columbia, 637 S.W.2d 251 (Mo. App., W.D. 1982), the court indicated that investigation records of law enforcement agencies generally come within the definition of public records. Id. at 259. The next question is whether there is any provision for their closure, or whether the records and the information contained therein are altogether unprotected from disclosure on demand.

Nothing in Sections 610.100, RSMo Supp. 1984, et seq., specifically provides for the closure of police investigative reports. For instance, Section 610.100, which pertains to the closure of arrest records only, reads as follows:

> If any person is arrested and not charged with an offense against the law within thirty days of his arrest, official records of the arrest and of any detention or confinement incident thereto shall thereafter be closed records except as provided in section 610.120

Likewise, Section 610.105, RSMo Supp. 1984, which pertains to the closure of certain case records, makes no specific reference to police investigative reports:

> If the person arrested is charged but the case is subsequently nolle prossed, dismissed, or the accused is found not guilty or imposition of sentence is suspended in the court in which the action is prosecuted, official records pertaining to the case shall thereafter be closed records when such case is finally terminated except as provided in section 610.120.

Although the above statutes do not specifically refer to police investigative reports, they do refer to records of the arrest and official records pertaining to the case. The purpose of these statutes would be thwarted if such reports were to remain open while the arrest records or other case records were closed. For example, Section 610.105, as set

forth above, mandates the closure of case records if a defendant is charged but not convicted. The purpose of this type of statute is to ensure that persons who have been charged with crimes but not thereafter convicted are not burdened with the stigma of being charged with a criminal offense which they may not have committed. See State v. Krause, 530 S.W.2d 684 (Mo. banc 1975) (interpreting Section 195.230, RSMo Supp. 1975). Closing only the case record, however, would be ineffective in alleviating the stigma of the criminal charge if the public was permitted to obtain the same information from pre-arrest investigative reports. In other words, if the pre-arrest investigative reports remain open, Section 610.105 becomes meaningless. Likewise, the closing of only the arrest and incarceration records under Section 610.100, is a futile effort if the public has access to the same information by examining the police investigative reports.

We note that in Brown v. Weir, 675 S.W.2d 135, 140 (Mo. App. 1984) and Wilson v. McNeal, 575 S.W.2d 802, 810 (Mo. App. 1979) it was held that records of a closed meeting are closed despite the absence of a statute closing such records.

It is presumed that the legislature does not intend to enact absurd laws and the courts favor construction of statutes which avoid unnecessary and unreasonable results. State ex rel. McNary v. Hais, 670 S.W.2d 494, 495 (Mo. banc 1984). It is also to be presumed that legislative action is intended to have some substantive effect and that the statute must be construed in light of the purpose that the legislature sought to accomplish. State ex rel. Bell v. City of Fulton 642 S.W.2d 617, 620-621 (Mo. banc 1982). Since it would be useless and unreasonable to require the closure of arrest and case records and not also require the closure of police investigative reports, it is our opinion that the law favors the construction which requires the closure of police investigative reports when a person is arrested but not charged, or when a person is charged but the charge subsequently is nolle prossed, dismissed or the accused is found not guilty or imposition of sentence is suspended. Accordingly, we conclude that all investigative records are included in the provisions requiring the closure of official records of the arrest and official records pertaining to the case.

Separate treatment must be given your question asking whether Sections 610.100, et seq., require the closure of police investigative reports in cases where a suspect is identified but is neither arrested or charged with an offense. The Arrest Records Law makes no reference to the closure of any

records in this situation. Thus, statutory construction of the Arrest Records Law alone cannot be employed to authorize or mandate the closure of police investigative reports in situations where the suspect has yet to be arrested.

For the answer to your question asking whether all information in a police investigative report should be or must be released to the public upon demand, we must look to other provisions of the Sunshine Law and to case law.

It would not be appropriate for this office to issue you an official opinion on all the situations which might arise because of the myriad factual situations which might exist. Several things, however, are quite clear. First of all, the majority of the questions which might arise are in fact answered by Hyde v. City of Columbia, supra. In addition, it is quite clear that even though a situation might not fall directly under Hyde, it may fall within the theory and teachings of Hyde. Under the express provisions of the Sunshine Law, Section 610.015, RSMo 1978, public records are open, unless, inter alia, it is otherwise provided by law. Such exception is not subject to the voting and other requirements of Section 610.025, RSMo Supp. 1985. See Opinion No. 119-84, copy enclosed. Under Section 610.025, RSMo Supp. 1985, certain records may be closed, by vote, because of express exemption under that law. Records may be or are closed because of the provisions of other statutes and, as extended by Hyde, because of other requirements for closure or deletion on a theory of law recognizing personal privacy, the efficient suppression and punishment of crime, the protection of third persons, or the like.

Therefore, while certain information in such situations should be made available to the public, it is clear that other information, depending on the circumstances, must or may be deleted.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

Enclosure:

Opinion No. 119-84

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
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WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
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March 20, 1986

OPINION LETTER NO. 43-86

FILED
43

The Honorable Roy D. Blunt
Secretary of State
State Capitol Building
Jefferson City, Missouri 65101

Dear Secretary Blunt:

This letter is in response to your request for our review under Sections 116.332 and 116.334, RSMo Supp. 1985, for sufficiency as to form of an initiative petition relating to the amendment of various sections of the Missouri Constitution and, specifically, Sections 17, 20 and 22 of Article X. A copy of the initiative petition and the proposed amendment which you submitted to this office on March 12, 1986, are attached for reference.

We approve the petition as to form. However, since the Secretary of State has been given final approval or rejection authority under Section 116.332, our approval of the form of the petition does not preclude you from rejecting the petition.

Inasmuch as our review is simply for the purpose of determining sufficiency as to form, the fact that we do not reject the petition is not to be construed as a determination that the petition is sufficient as to substance. See Moore v. Brown, 165 S.W.2d 657 (Mo. banc 1942). Likewise, since our review is mandated by statute, no action we take with respect to such review should be construed as an endorsement of the petition or as the expression of any view respecting the adequacy or inadequacy of the petition generally or of the objectives of its proponents.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

Enclosure

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
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WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
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March 20, 1986

OPINION LETTER NO. 44-86

The Honorable Roy D. Blunt
Secretary of State
State Capitol Building
Jefferson City, Missouri 65101

FILED
44

Dear Secretary Blunt:

This letter is in response to your request for our review under Sections 116.332 and 116.334, RSMo Supp. 1985, for sufficiency as to form of an initiative petition relating to the amendment of various sections of the Missouri Constitution and, specifically, Sections 1 and 11(c) of Article X. A copy of the initiative petition and the proposed amendment which you submitted to this office on March 12, 1986, are attached for reference.

We approve the petition as to form. However, since the Secretary of State has been given final approval or rejection authority under Section 116.332, our approval of the form of the petition does not preclude you from rejecting the petition.

Inasmuch as our review is simply for the purpose of determining sufficiency as to form, the fact that we do not reject the petition is not to be construed as a determination that the petition is sufficient as to substance. See Moore v. Brown, 165 S.W.2d 657 (Mo. banc 1942). Likewise, since our review is mandated by statute, no action we take with respect to such review should be construed as an endorsement of the petition or as the expression of any view respecting the adequacy or inadequacy of the petition generally or of the objectives of its proponents.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

Enclosure

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

September 10, 1986

OPINION LETTER NO. 45-86

The Honorable Edwin L. Dirck
Senator, District 24
State Capitol Building, Room 221
Jefferson City, Missouri 65101

FILED
45

Dear Senator Dirck:

This opinion is in response to the following question:

> Does a day program for head injured persons, sixteen years or older, qualify as a service for persons defined as handicapped in Section 205.968.2 and Section 178.900, and thus as a program qualified to receive funds pursuant to Section 205.968.

As set out in Section 205.968, RSMo Supp. 1984, the governing body of any county or city not within a county may establish individually, or in any combination, sheltered workshops, residence facilities or related services for the care or employment, or both of handicapped persons. Subsection 2 of Section 205.968, RSMo Supp. 1984, states in part:

> 2. The facilities or services may only be provided for those persons defined as handicapped persons in section 178.900, RSMo, and those persons defined as handicapped persons in this section whether or not employed at the facility or in the community, and for persons who are handicapped due to developmental disability.
> . . .

Whether a day program for head injured persons qualifies to receive funds pursuant to Section 205.968, is dependent upon whether individuals with head injury enrolled in the program meet one of the three definitions of handicapped person contained in Section 205.968.2.

The first definition of a handicapped person eligible for facilities or services is based on Section 178.900, RSMo 1978, which defines handicapped persons as follows:

* * *

> (2) "Handicapped persons", a lower range educable or upper range trainable mentally retarded or other handicapped person sixteen years of age or over who has had school training and has a productive work capacity in a sheltered environment adapted to the abilities of the mentally retarded but whose limited capabilities make him nonemployable in competitive business and industry and unsuited for vocational rehabilitation training;

* * *

The second definition of a handicapped person is contained in subsection 3(2) of Section 205.968, RSMo Supp. 1984, which provides as follows:

> 3. For the purposes of sections 205.968 to 205.972, the term
>
> * * *
>
> (2) "Handicapped person" shall mean a person who is lower range educable or upper range trainable mentally retarded or a person who has a developmental disability.

The third definition of a handicapped person eligible for facilities or services is contained in Section 205.968.2, RSMo Supp. 1984, which states in part:

> 2. The facilities or services may only be provided . . . and for persons who are handicapped due to developmental disability. . . .

Developmental disability is defined in Section 205.968.3, (1) RSMo Supp. 1984, as follows:

> 3. For purposes of sections 205.968 to 205.972, the term

> (1) "Developmental disability" shall mean:
>
> (a) A disability which is attributable to mental retardation, cerebral palsy, autism, epilepsy, a learning disability related to a brain dysfunction or a similar condition found by comprehensive evaluation to be closely related to such conditions, or to require habilitation similar to that required for mentally retarded persons;
>
> (b) Which originated before age eighteen; and
>
> (c) Which can be expected to continue indefinitely;

In House Bill No. 1243, Eighty-Third General Assembly, Second Regular Session, one finds the following definition of "head injury":

* * *

> (2) "Head injury" or "traumatic head injury", a sudden insult or damage to the brain or its coverings not of a degenerative nature. Such insult or damage may produce an altered state of consciousness and may result in a decrease of one or more of the following: mental, cognitive, behavioral or physical functioning resulting in partial or total disability. Cerebral vascular accidents, aneurisms and congenital deficits are specifically excluded from this definition;

* * *

As we understand the facts, a person with head injury has suffered traumatic injury to the brain or its coverings, and one or more of the results may be that the injured person suffers a decrease in mental functioning, cognitive functioning or behavioral functioning. We further understand that the definitions of mental retardation and developmental disability include head injured persons if those persons meet the classification criteria (see Classification in Mental Retardation, American Association on Mental Deficiency, 1983, p. 11, p. 168).

In our opinion, this decrease in functioning could result in the person meeting one of the three definitions of handicapped person contained or referenced in Section 205.968. Whether or not any particular individual meets one of these definitions is a matter for persons trained to assess and diagnose mental retardation, developmental disability, and/or the ability to obtain competitive employment.

However, Section 205.968.2, establishes the right of the county board of directors governing the Section 205.968 facilities and services to impose limitations on individuals to be served or services to be provided, such limitations to be reasonable in light of available funds, needs of the persons and community to be served as assessed by the board, and the appropriateness and efficiency of combining services to persons with various types of handicaps or disabilities. We do not address whether Section 205.968.2 would authorize a county board to refuse funding to an otherwise qualified program serving developmentally disabled or retarded persons solely because the onset of mental retardation or developmental disability in persons served by the program was the result of traumatic brain injury.

It is the opinion of this office that a day program for head injured persons may qualify as a service for persons defined as handicapped in Section 205.968.2 and Section 178.900, and thus a program qualified to receive funds pursuant to Section 205.968, where such head injured persons meet one of the three definitions of handicapped persons as set out in Section 205.968.2, and where the county board has not imposed limitations with respect to individuals to be served or services to be provided which would effect such funding.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
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April 1, 1986

OPINION LETTER NO. 48-86

The Honorable Rex R. Wyrick
Representative, District 113
State Capitol Building, Room 106-B
Jefferson City, Missouri 65101

FILED
48

Dear Representative Wyrick:

This letter is in response to your question asking:

> Does the term "taxable inhabitants" in § 80.020 RSMo 1978 include or exclude persons who are not residents within the area proposed as a town or village, even though such persons own taxable property within the area proposed as a town or village?

The statement of facts in your opinion request indicates that the Camden County Commission has been petitioned to form a village in the Horseshoe Bend area of Camden County, Missouri. You state that there are approximately three thousand, eight hundred (3,800) people or entities who own property in the area of the proposed village. However, you state that there are only four hundred sixty-seven (467) "residents" and only three hundred fifty-four (354) of these residents are adults.

Section 80.020, RSMo 1978, requires, in part, that a petition to form a town or village, signed by "two-thirds of the taxable inhabitants of any town or village", be filed with the county court or commission.

Opinion No. 39, Hensley, 1956, copy enclosed, concluded that the term "taxable inhabitants" includes only those who are sui juris and would thus exclude children under the age of eighteen (18) years. See, e.g., Section 431.055, RSMo 1978. This case relied upon State ex rel. Lee v. Jenkins, 25 Mo. App. 484, 488 (1887) which, in response to a claim that

the term "taxable inhabitants" in a predecessor of Section 80.020, RSMo 1978, included all inhabitants, replied that: "Such an interpretation would, in nine cases out of ten, render the law impossible of execution. It is not unreasonable to suppose that in many, if not a majority of, Missouri towns and villages, at least one-half the population consists of . . . children [and other persons who are not sui juris]. It would, therefore, be impossible for two-thirds of the whole number to sign a petition, without including many who are not sui juris." 25 Mo. App. at 488. However, the petition dealt with in Lee was signed by the "residents and taxable inhabitants of the Village of Doniphan." 25 Mo. App. at 488. See also State ex rel. Sutton v. Wiethaupt, 150 Mo. App. 54, 129 S.W. 768, 769 (1910) (petition to form a third class city under the name of Maplewood in St. Louis County was signed by the "assessed taxpaying citizens residing within the boundaries of said proposed corporation.").

In Schlarman v. City of St. Charles, 623 S.W.2d 57 (Mo. App. 1981), the court defined the term "inhabitant" as an "occupant"; i.e., one having present control of the area. This definition of "inhabitant" could raise many problems with the administration of the statute in question. For example, one would have to decide whether owners of second homes inhabit their vacation dwelling during non-vacation periods; whether all the owners of time-share condominiums are "taxable inhabitants"; whether corporations, partnerships or other entities owning taxable property are inhabitants; and whether landlords leasing residential property in the area of the proposed village but permanently residing outside this area occupy or inhabit the rented premises if they retain control of common areas. Reading the term "taxable inhabitants" as the functional equivalent of "taxable occupant", under the broad definition adopted in Schlarman, leads to some absurd results and an impossibility of administration of the statute in question. Lee stands for the proposition that such "absurd" interpretations should not be adopted.

A few cases define the term "taxable inhabitant" as the functional equivalent of "taxable resident". See, e.g., Howe v. Town of Ware, 330 Mass. 487, 115 N.E.2d 455 (1953). The problem with adopting this definition of the term "taxable inhabitant" is the technical definition of the term "resident" in Missouri. See, e.g., State ex rel. King v. Walsh, 484 S.W.2d 641 (banc 1972) (defining the word "resident" as not requiring actual, physical presence).

In State ex rel. Little v. Board of County Commissioners of Cherry County, 182 Neb. 419, 155 N.W.2d 351 (1967), the

court adopted the Black's Law Dictionary definition of inhabitant as: "One who resides actually and permanently in a given place, and has his domicile there." 155 N.W.2d at 354 (quoting Black's Law Dictionary 921 (4th Ed.)). We believe this latter definition is consistent with the legislative intent behind the statute.

We conclude that the term "taxable inhabitants" in Section 80.020, RSMo 1978, excludes persons who are not actual and permanent residents of the area proposed as a town or village, even though such persons may own taxable property within the area proposed as a town or village.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

April 28, 1986

OPINION LETTER NO. 49-86

FILED
49

The Honorable Donald McQuitty
Representative, District 12
1008 Englewood
Macon, Missouri 63552

Dear Representative McQuitty:

This opinion is in response to your question asking:

> Is dog food purchased for use and consumption at a commercial canine operation subject to Missouri sales tax?

Section 144.030.2(1), RSMo Supp. 1985, creates a sales tax exemption for "feed for livestock or poultry to be sold ultimately in processed form or otherwise at retail". See also Section 144.030.2(22), RSMo Supp. 1985; 12 CSR 10-3.278 (discussing the exemption for feed additives).

12 CSR 10-3.286 states:

> (1) Livestock is defined as an animal normally raised or grown as food for human consumption such as cattle swine and sheep. Other animals not normally raised or grown as food for human consumption such as horses, cats, dogs, chinchillas, and laboratory animals such as rats, mice, hamsters, primates and guinea pigs are not livestock and feed for these animals is subject to the sales tax.
>
> (2) Example 1: A rabbit farmer raises rabbits which are sold for processing as food for human consumption. Persons selling the feed would not be subject to sales tax as the rabbits are considered livestock in this situation.
>
> (3) Example 2: A person selling feed to a pet shop, raising rabbits which are sold to

> the general public for pets is subject to the sales tax on the feed at the time of sale. Persons selling rabbits for pets are subject to the sales tax on the gross receipts from all such sales.

(Emphasis added.)

The foregoing rule of the Missouri Department of Revenue indicates that dogs are not "livestock". This is consistent with the law in other jurisdictions. See, e.g., Pedersen v. Green, 105 So. 2d 1 (Fla. 1958) (held that a sales tax exemption for "feeds" would include feed for zoo animals and, inter alia, dogs, but that a subsequent sales tax exemption for "feed for livestock" would raise additional revenue because it was more restrictive); Howard & Herrin v. Nashville, C. & St. L. Ry. Co., 153 Tenn. 649, 284 S.W. 894 (1926) (dogs are not livestock); Brundidge Milling Company, Inc. v. State, 45 Ala. App. 208, 228 So. 2d 475 (1969) (court, in considering whether farm-grown catfish are livestock, rejected appellant's argument that, but for the express exemption of cats and dogs in Alabama's "feed for livestock" sales tax exemption, they would be included as livestock); Development Associates, Inc. v. Wake County Board of Adjustment, 48 N.C.App. 541, 269 S.E.2d 700 (1980), petition denied, 301 N.C. 719, 274 S.E.2d 227 (1981) (dogs are pets, not livestock); Kansas Attorney General Opinion, dated February 9, 1983 (sales of feed for dogs not entitled to sales tax exemption, because dogs are not raised for consumption); Maryland Attorney General Opinion, dated June 22, 1983 ("feed for livestock" exemption in Maryland sales tax act did not include food for dogs); Mississippi Attorney General Opinion, dated October 7, 1977 (feed mill manufacturing dog food was subject to city license tax, as mill was not entitled to feed for livestock exemption; dogs are not livestock); Advisory Opinion of the New York State Tax Commission (Petition No. 5800716A, dated January 6, 1981) (concluding that the commercial raising and feeding of dogs for sale as pets did not constitute "farming" for purposes of sales tax exemption).

Accordingly, we conclude that dog food purchased for use and consumption at a commercial canine operation is subject to Missouri Sales Tax.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

April 1, 1986

OPINION LETTER NO. 54-86

FILED
54

The Honorable Roy D. Blunt
Missouri Secretary of State
State Capitol Building
Jefferson City, Missouri 65101

Dear Secretary Blunt:

This letter is in response to your correspondence submitting to us a statement of purpose prepared pursuant to Section 116.334, RSMo Supp. 1985, which is to be the petition title for a proposed amendment to Article X, Sections 17, 20 and 22 of the Missouri Constitution and also is to be the ballot title if the amendment is placed on the ballot. See our Opinion Letter No. 43-86.

We approve the legal content and form of the proposed statement, copy enclosed.

Under the provisions of Section 116.334, the approved statement of purpose must be used for the title of the petition to be circulated, in lieu of the title submitted by the proponents, and for the ballot title if the amendment is placed on the ballot.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

Enclosure

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

April 1, 1986

OPINION LETTER NO. 55-86

The Honorable Roy D. Blunt
Missouri Secretary of State
State Capitol Building
Jefferson City, Missouri 65101

FILED
55

Dear Secretary Blunt:

This letter is in response to your correspondence submitting to us a statement of purpose prepared pursuant to Section 116.334, RSMo Supp. 1985, which is to be the petition title for a proposed amendment to Article X, Sections 1 and 11(c) of the Missouri Constitution and also is to be the ballot title if the amendment is placed on the ballot. See our Opinion Letter No. 44-86.

We approve the legal content and form of the proposed statement, copy enclosed.

Under the provisions of Section 116.334, the approved statement of purpose must be used for the title of the petition to be circulated, in lieu of the title submitted by the proponents, and for the ballot title if the amendment is placed on the ballot.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

Enclosure

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

April 28, 1986

OPINION LETTER NO. 59-86

FILED
59

The Honorable James R. Strong
Senator, District 6
State Capitol Building, Room 225
Jefferson City, Missouri 65101

Dear Senator Strong:

This letter is in response to your questions asking:

> Given the statutory mandate under section 217.600, RSMo Supp. 1984, that the division shall operate a correctional farm program, the legal question is whether the Department of Corrections and Human Resources has the statutory or constitutional authority to phase out the prison farm program without further legislative action granting such authority; and, if it does not possess such authority, whether the Department of Corrections and Human Resources has the authority without further legislative action, to eliminate virtually all aspects of the prison farm program, retaining only a gardening project given the statutory language of section 217.605, RSMo Supp. 1984, that the "correctional farm program shall be diversified so as to employ as many inmates as possible."

Section 217.600.1, RSMo Supp. 1984, provides as follows:

> The division shall establish and operate at its institutions a correctional farm program. The division director shall have general supervision over the planning, establishment and management of all farm operations within the division.

The term "division director" is not defined for purposes of Section 217.600, RSMo Supp. 1984.

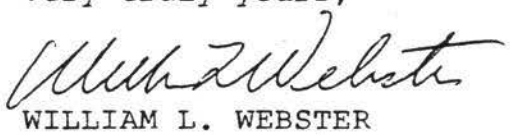
Section 217.605.1, RSMo Supp. 1984, provides:

> The correctional farm program shall be diversified so as to employ as many inmates as possible.

Information we have obtained from the Missouri Department of Corrections and Human Resources reveals that in 1984, the vegetable farming operation generated 290,000 pounds of vegetables. At Algoa, 250,000 plants equalling 150,000 pounds of produce were produced by 40 inmates on 40 acres of farmland. At Chillicothe, 4,900 pounds of produce were harvested in 1984. At Renz Farm, 92,000 pounds of produce were harvested at a cost of only $500 by 14 inmate gardeners. At Boonville, 28 gallons of radishes, 8000 cucumbers, 24,000 tomatoes, 80 pounds of onions, 2,500 ears of corn, and 1000 cantaloupes were produced. Programs at MECC (Pacific) and CMCC (Church Farm) and SCPRC (Tipton) are small but expanding. At MSP (Jefferson City), 12,000 pounds of vegetables were produced.

While some appear to be of the opinion that the current correctional farm program is not diversified so as to employ as many inmates as possible, our view of the facts is to the contrary. The Missouri Department of Corrections and Human Resources' vegetable farming operation appears to produce a large and diversified crop of vegetables. This vegetable farming operation also appears to employ a substantial number of inmates. Thus, we conclude that the current correctional farm program complies with Sections 217.600 and 217.605, RSMo Supp. 1984.

Very truly yours,



WILLIAM L. WEBSTER
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

April 3, 1986

FILED
62

John A. Pelzer
Commissioner of Administration
125 State Capitol
Jefferson City, Missouri

Dear Mr. Pelzer:

We have examined the abstract of title to certain real property in Cole County, Missouri, as specifically described in Attachment A. Said abstract is last certified to March 20, 1986, at 5:00 p.m., by Cole County Abstract, Realty & Insurance Co.

It is our opinion, based solely upon information contained in the abstract, that a marketable title to the property described in the first two paragraphs in Attachment A, and permanent, nonexclusive rights in the four (4) roadway easements described in the remaining paragraphs in Attachment A, are vested in Roth's Properties, a limited partnership, subject to the following:

1. At page 230 of the abstract there is a deed of trust dated December 20, 1976, from Roth's Properties, a limited partnership, to Robert S. Gardner, trustee for Third National Bank, given to secure the payment of a promissory note in the amount of $500,000. The deed of trust is recorded in Book 157 at Page 320 in the land records for Cole County, Missouri, and is a lien on the property.

2. Utility easements described on pages 159-160, 162-164 and 175-177. It is probable that there are additional rights-of-way and utility easements whose precise locations are not determinable from instruments of record, but only by a current survey.

3. State, county and city taxes for the year 1986 are a lien on the property, but are not yet payable.

For examination purposes, all affidavits appearing in the abstract are assumed by the examiner to be true.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

Wm. Clark Kelly
Assistant Attorney General

rds
Enclosure

ATTACHMENT A

Part of the Northwest quarter of Section 24, Township 44 North, Range 12 West, in the City of Jefferson, Cole County, Missouri, more particularly described as follows:

From the southwest corner of the Northwest quarter of the Northwest quarter of said Section 24; thence South 88 degrees 30 minutes 55 seconds east, 855.87 feet, to an old iron bar in the northwesterly right-of-way line of U. S. Highway No. 54; thence North 45 degrees 31 minutes 05 seconds east, along said northwesterly right-of-way line, 497.73 feet, to an iron rod; thence North 53 degrees 46 minutes 40 seconds west, 166.18 feet, to an iron rod at the beginning point of this description; thence South 28 degrees 16 minutes 17 seconds west, 15.21 feet, to a point; thence North 61 degrees 43 minutes 43 seconds west, 632.21 feet, to a point in the southeasterly right-of-way line of Missouri Highway "C"; thence northeasterly along said southeasterly right-of-way line, along a curve having a radius of 5834.65 feet, 280.20 feet, to a right-of-way marker; thence North 56 degrees 09 minutes 17 seconds east, 85.50 feet, to an iron rod; thence South 61 degrees 43 minutes 43 seconds east, 498.58 feet, to an iron rod; thence South 28 degrees 16 minutes 17 seconds west, 104.18 feet, to an iron rod; thence North 61 degrees 43 minutes 43 seconds west, 43.29 feet, to an iron rod; thence South 28 degrees 16 minutes 17 seconds west, 200.61 feet, to the beginning point of this description. Containing 4.08 acres.

Together with a roadway easement more particularly described as follows: Part of the Northwest quarter of Section 24, Township 44 North, Range 12 West, in the City of Jefferson, Missouri, more particularly described as follows: From the southwest corner of the Northwest quarter of the Northwest quarter of said Section 24; thence South 88 degrees 30 minutes 55 seconds east, 855.87 feet, to an old iron bar in the northwesterly right-of-way line of U. S. Highway No. 54; thence along said right-of-way line, North 45 degrees 31 minutes 05 seconds east, 497.73 feet, to an iron rod; thence North 53 degrees 46 minutes 40 seconds west, 166.18 feet, to an iron rod; thence South 28 degrees 16 minutes 17 seconds west, 15.21 feet, to a point; thence North 61 degrees 43 minutes 43 seconds west, 632.21 feet, to a point in the southeasterly right-of-way line of Missouri Highway "C", and the beginning point of this easement; thence South 61 degrees 43 minutes 43 seconds east, 46.43 feet, to a point; thence southwesterly along a curve having a radius of 5874.65 feet, 159.56 feet, to a

point; thence North 29 degrees 57 minutes 48 seconds west, 40.00 feet, to the southeasterly right-of-way line of said Highway "C"; thence along said southeasterly right-of-way line, along a curve having a radius of 5834.65 feet, 135.11 feet, to the beginning point of this easement.

Together with a roadway easement more particularly described as follows: Part of the Northwest quarter of Section 24, Township 44 North, Range 12 West, in the City of Jefferson, Missouri, more particularly described as follows: From the southwest corner of the Northwest quarter of the Northwest quarter of said Section 24; thence South 88 degrees 30 minutes 55 seconds east, 855.87 feet, to an old iron bar in the northwesterly right-of-way line of U. S. Highway No. 54; thence along said northwesterly right-of-way line, North 45 degrees 31 minutes 05 seconds east, 594.53 feet, to a right-of-way marker; thence North 28 degrees 16 minutes 17 seconds east, 131.15 feet, to an iron rod; thence North 61 degrees 43 minutes 43 seconds west, 150.00 feet, to an iron rod; thence North 28 degrees 16 minutes 17 seconds east, 104.18 feet, to an iron rod; thence North 61 degrees 43 minutes 43 seconds west, 498.58 feet, to an iron rod, in the southeasterly right-of-way line of Missouri Highway "C", and the beginning point of this easement; thence along said right-of-way line, North 56 degrees 09 minutes 17 seconds east, 96.31 feet, to a point; thence South 33 degrees 50 minutes 43 seconds east, 40.00 feet, to a point; thence South 56 degrees 09 minutes 17 seconds west, 75.14 feet, to a point; thence North 61 degrees 43 minutes 43 seconds west, 45.25 feet, to the beginning point of this easement.

Together with a roadway easement more particularly described as follows: Part of the Northwest quarter of Section 24, Township 44 North, Range 12 West, in the City of Jefferson, Missouri, more particularly described as follows: From the southwest corner of the Northwest quarter of the Northwest quarter of said Section 24; thence South 88 degrees 30 minutes 55 seconds east, 855.87 feet, to an old iron bar in the northwesterly right-of-way line of U. S. Highway No. 54; thence along said northwesterly right-of-way line, North 45 degrees 31 minutes 05 seconds east, 594.53 feet, to a right-of-way marker; thence North 28 degrees 16 minutes 17 seconds east, 397.81 feet, to an iron rod; thence North 61 degrees 43 minutes 43 seconds west, 150 feet, to an iron rod; thence North 28 degrees 16 minutes 17 seconds east, 279.44 feet, to the southerly right-of-way line of Ellis Boulevard; thence westerly along said southerly right-of-way, 22 feet, to the beginning point of this easement; thence continuing westerly along said

southerly right-of-way, 25 feet; thence South 28 degrees 16 minutes 17 seconds west, to the southerly line of a tract conveyed to Wetterau Incorporated, by deed of record in Book 242, page 295, Cole County Recorder's Office; thence easterly along said southerly line, 25 feet; thence North 28 degrees 16 minutes 17 seconds east, to the beginning point of this easement.

Together with a roadway easement more particularly described as follows: Part of the Northwest quarter of Section 24, Township 44 North, Range 12 West, in the City of Jefferson, Missouri, more particularly described as follows: From the southwest corner of the Northwest quarter of the Northwest quarter of said Section 24; thence South 88 degrees 30 minutes 55 seconds east, 855.87 feet, to an old iron bar in the northwesterly right-of-way line of U. S. Highway No. 54; thence along said northwesterly right-of-way line, North 45 degrees 31 minutes 05 seconds east, 497.73 feet, to an old iron rod, at the most southerly corner of a tract conveyed to George Pardalos and Arris J. Pardalos, by deed of record in Book 242, page 624, Cole County Recorder's Office; thence continuing along the northwesterly right-of-way line of said Highway No. 54, North 45 degrees 31 minutes 05 seconds east, 96.80 feet, to a right-of-way marker; thence North 28 degrees 16 minutes 17 seconds east, 16.15 feet, to the beginning point of this easement; thence continuing along said northwesterly right-of-way line, North 28 degrees 16 minutes 17 seconds east, 30.00 feet, to a point; thence North 61 degrees 43 minutes 43 seconds west, 178.29 feet, to a point; thence North 28 degrees 16 minutes 17 seconds east, 85.00 feet, to a point on the northeasterly line of the said Pardalos tract; thence North 61 degrees 43 minutes 43 seconds west, along the said northeasterly line of the Pardalos tract, 15.00 feet, to the most northerly corner of said tract; thence South 28 degrees 16 minutes 17 seconds west, along the northwesterly line of the said Pardalos tract, 115 feet; thence South 61 degrees 43 minutes 43 seconds east, 193.29 feet, to the beginning point of this easement.

EXCEPT from the last described easement that part described in Book 278, page 602, Cole County Recorder's Office.

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

April 28, 1986

OPINION LETTER NO. 63-86

FILED
63

John A. Pelzer
Commissioner of Administration
Office of Administration
Post Office Box 809
Jefferson City, Missouri 65102

Dear Mr. Pelzer:

This letter is in response to your question asking:

> Is the Marshall Region Council on Developmental Disabilities an Instrumentality as defined in Sections 105.300.7 and 105.350.1, RSMo. 1978, for the purpose of extending benefits of Title II of the Social Security Act (42 U.S.C.A., Section 401 et seq.)?

It is our understanding that the Marshall Regional Council on Developmental Disabilities is a Missouri not-for-profit corporation generally operating under Chapter 355, RSMo. Apparently, this corporation was organized in 1972. In 1980, after the adoption of what is now Sections 633.040 to 633.050, RSMo Supp. 1984, the Missouri Department of Mental Health designated the Marshall Region Council on Developmental Disabilities as a regional council under these statutes. Subsection 2 of Section 633.040, RSMo Supp. 1984, recognizes the designation of not-for-profit corporations as regional councils by specifying that members of boards of directors of not-for-profit corporations are not subject to certain membership requirements otherwise imposed upon regional councils.

In Opinion Letter No. 10, Raftery, 1976, copy enclosed, this office concluded that area agencies on aging, which are organized as not-for-profit corporations under Chapter 355,

RSMo, are not instrumentalities of the state as that term is used in Chapter 105, RSMo. We see no distinguishable difference between the organization of the area agencies on aging and the Marshall Region Council on Developmental Disabilities as far as social security reporting provisions are concerned. Accordingly, we conclude that the Marshall Region Council on Developmental Disabilities is not an agency of the state for purposes of Sections 105.300.7 and 105.350.1, RSMo 1978.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY
65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

April 25, 1986

OPINION LETTER NO. 64-86

FILED
64

Albert A. Riederer
Jackson County Prosecuting Attorney
415 East 12th Street, Floor 7M
Kansas City, Missouri 64106

Dear Mr. Riederer:

This letter is in response to your question asking:

> If the Secretary of the Treasury or the Attorney General of the United States transfers, pursuant to 19 U.S.C. §1616, any property seized or forfeited under the provisions of 21 U.S.C. §881(a)-(e) to a State or local law enforcement agency, may that State or local law enforcement agency acquire title, retain, use and dispose of such property like any other property of that agency?

19 U.S.C. Section 1616 provides:

> (a) Notwithstanding any other provision of the law, the Commissioner is authorized to retain forfeited property, or to transfer such property on such terms and conditions as he may determine to --
>
> (1) any other Federal agency; or
>
> (2) any State or local law enforcement agency which participated directly in any of the acts which led to the seizure or forfeiture of the property.

The Secretary of the Treasury shall ensure the equitable transfer pursuant to paragraph (2) of any forfeited property to the appropriate State or local law enforcement agency so as to reflect generally the contribution of any such agency participating directly in any of the acts which led to the seizure or forfeiture of such property. A decision by the Secretary pursuant to paragraph (2) shall not be subject to review. The United States shall not be liable in any action arising out of the use of any property the custody of which was transferred pursuant to this section to any non-Federal agency.

(b) The Secretary of the Treasury may order the discontinuance of any forfeiture proceedings under this Act in favor of the institution of forfeiture proceedings by State or local authorities under an appropriate State or local statute. After the filing of a complaint for forfeiture under this Act, the Attorney General may seek dismissal of the complaint in favor of forfeiture proceedings under State or local law.

(c) Whenever forfeiture proceedings are discontinued by the United States in favor of State or local proceedings, the United States may transfer custody and possession of the seized property to the appropriate State or local official immediately upon the initiation of the proper actions by such officials.

(d) Whenever forfeiture proceedings are discontinued by the United States in favor of State or local proceedings, notice shall be sent to all known interested parties advising them of the discontinuance or dismissal. The United States shall not be liable in any action arising out of the seizure, detention, and transfer of seized property to State or local officials.

21 U.S.C. Section 881(e) provides in part:

> (e) Whenever property is civilly or criminally forfeited under this title the Attorney General may --
>
> (1) retain the property for official use or transfer the custody or ownership of any forfeited property to any Federal, State, or local agency pursuant to section 616 of the Tariff Act of 1930;
>
> * * *
>
> The Attorney General shall ensure the equitable transfer pursuant to paragraph (1) of any forfeited property to the appropriate State or local law enforcement agency so as to reflect generally the contribution of any such agency participating directly in any of the acts which led to the seizure or forfeiture of such property. A decision by the Attorney General pursuant to paragraph (1) shall not be subject to review. . . .

While mention has been made of the state narcotics forfeiture procedures, Section 195.140, RSMo Supp. 1984, and Section 195.145, RSMo 1978, we believe that the underlying question is whether the State of Missouri and local governmental entities, particularly the City of Kansas City and Jackson County, Missouri, may receive gifts or donations conditioned upon the use of the property by a state or local law enforcement agency.

A.

State

Section 33.550, RSMo 1978, provides as follows:

> Whenever any devise, bequest, donation, gift or assignment of money, bonds or choses of action, or of any property, real, personal or mixed, shall be made or offered to be made to this state, the director of revenue shall be and is hereby authorized to receive and accept the same on such terms, conditions and limitations as may be agreed

> upon between the grantor, donor or assignor of said property and said official, so that the right and title to such property shall pass to and vest in this state, and all such property so vested in this state and the proceeds thereof when collected may be appropriated for educational purposes, or for such other purposes as the legislature may direct.

We believe that the above-quoted statute allows the transfer of forfeited property to the State of Missouri upon the condition that the property be for the use and benefit of a state law enforcement agency. While the proceeds of such gifts are subject to the control of the legislature, when the state takes such a gift on condition, the conditions become a limitation on the disposition of the gifted property.

B.

The City of Kansas City and Jackson County, Missouri

Your opinion request also appears to concern the authority of the City of Kansas City, Missouri, specifically the Drug Enforcement Unit of the Kansas City Police Department, and Jackson County, Missouri, specifically the Jackson County Sheriff's Department, to receive forfeited property from the United States. Both of these entities possess constitutional charters, and we believe it is more appropriate for attorneys more familiar with the charters of such entities to opine on the question you ask. However, we find no constitutional or statutory provision prohibiting local governmental entities from receiving and using such gifts.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

COUNTY HEALTH CENTERS:
POLITICAL SUBDIVISIONS:
THIRD CLASS CITIES:
TAXATION - PROPERTY:
TAXATION - RATE:
TAX RATE ROLLBACK:

The political subdivisions and taxing authorities in question may impose property tax rates up to the maximums discussed herein.

July 30, 1986

OPINION NO. 66-86

FILED
66

The Honorable Margaret Kelly, CPA
State Auditor of Missouri
Truman State Office Building, 8th Floor
Jefferson City, Missouri 65101

Dear Ms. Kelly:

This opinion is in response to a series of hypothetical situations you have posed, to-wit:

I.

Your first question asks:

> I. If a third class city 1) in 1980 levied a property tax for its General Revenue Fund of $1.00 per $100 assessed valuation, 2) in 1984 levied a property tax for its General Revenue Fund of $1.00, 3) in 1985 was required to reduce its property tax rate for its General Revenue Fund to $0.75 because of the constitutional and statutory provisions requiring a reduction in property taxes the year a general reassessment occurs, and 4) has never voted upon any additional property taxes as authorized by Article X, Section 11(c) of the Missouri Constitution,
>
> A. What is the city's maximum permissible property tax rate for 1986 for its General Revenue Fund which can be enacted by the governing body of the city without voter approval?

B. What is the city's maximum property tax rate for 1986 for its General Revenue Fund which can be authorized by a simple majority of the voters?

C. What is the city's maximum property tax rate for 1986 for its General Revenue Fund which can be authorized by a two-thirds majority of the voters?

D. Do the maximum property tax rates referred to in subparagraphs B and C above continue indefinitely?

E. If the governing body of the city desires to enact a property tax for 1986 for parks,

1) What is the maximum rate that can be authorized by the voters?

2) Does such authorization require approval of a simple majority of the voters or approval of two-thirds of the voters?

The City's 1980 non-voter-approved one dollar ($1.00) general operating levy was authorized by Missouri Constitution, Article X, Section 11(b) and Section 94.060.1, RSMo 1978, which state in part:

> Section 11(b). Any tax imposed upon such property by municipalities, . . . for their respective purposes, shall not exceed the following annual rates:
>
> For municipalities -- one dollar on the hundred dollars assessed valuation;
>
> * * *
>
> Section 94.060 -- 1. All cities of the third class in this state may by ordinance levy and impose annually for municipal purposes upon all subjects and

> objects of taxation within such cities a tax which shall not exceed the maximum rate of one dollar on the one hundred dollars assessed valuation; provided, however, that the rate of tax levy of one dollar on the one hundred dollars assessed valuation for municipal purposes may be increased for such purposes for a period not to exceed four years at any one time when such rate and purpose of increase are submitted to a vote of the voters within such cities and two-thirds of the voters voting thereon shall vote therefor, but such increase so voted shall be limited to a maximum rate of taxation not to exceed thirty cents on the one hundred dollars assessed valuation.

In addition, Missouri Constitution, Article X, Section 11(c), provides in part:

> In all municipalities . . . the rates of taxation as herein limited may be increased for their respective purposes for not to exceed four years, when the rate and purpose of the increase are submitted to a vote and two-thirds of the qualified electors voting thereon shall vote therefor; . . .

The one dollar ($1.00) levy in Section 94.060.1, RSMo 1978, is authorized by Missouri Constitution, Article X, Section 11(b), quoted above. The increase of that levy above one dollar ($1.00) in Section 94.060.1, RSMo 1978, is authorized in Missouri Constitution, Article X, Section 11(c). Although the one dollar ($1.00) levy and the increase in that levy above one dollar ($1.00) are both for "municipal purposes", we believe that these items should be considered separate levies for purposes of this opinion. The levy authorized by Article X, Section 11(c) is of limited duration, i.e., four years, and is authorized by its own constitutional provision.

On November 4, 1980, on the date that the City was still maintaining a one dollar ($1.00) general operating levy, the voters approved the Hancock Amendment, particularly Missouri Constitution, Article X, Section 22(a), which states in part:

> Counties and other political subdivisions are hereby prohibited from levying any tax, license or fees [sic], not authorized by law, charter or self-enforcing provisions of

> the constitution when this section is adopted or from increasing the current levy of an existing tax, license or fees [sic], above that current levy authorized by law or charter when the section is adopted without the approval of the required majority of the qualified voters of that county or other political subdivision voting thereon. . . . If the assessed valuation of property as finally equalized, excluding the value of new construction and improvements, increases by a larger percentage than the increase in the general price level from the previous year, the maximum authorized current levy applied thereto in each county or other political subdivision shall be reduced to yield the same gross revenue from existing property, adjusted for changes in the general price level, as could have been collected at the existing authorized levy on the prior assessed value.

Another part of the Hancock Amendment, particularly Missouri Constitution, Article X, Section 24(b), provides:

> The provisions contained in sections 16 through 23, inclusive, of this article are self-enforcing; provided, however, that the general assembly may enact laws implementing such provisions which are not inconsistent with the purposes of said sections.

On November 7, 1978, the people adopted Missouri Constitution, Article X, Section 10(c), which states:

> The general assembly may require by law that political subdivisions reduce the rate of levy of all property taxes the subdivisions impose whether the rate of levy is authorized by this constitution or by law. The general assembly may by law establish the method of increasing reduced rates of levy in subsequent years.

In State ex rel. Cassilly v. Riney, 576 S.W.2d 325 (Mo. banc 1979), the court indicated the need for a general reassessment of property values. This general reassessment was delayed by the General Assembly until the year beginning January 1, 1985. See Section 137.750.1, RSMO Supp. 1984.

To offset the effects of the increases in the assessed valuation of property due to the general reassessment, the General Assembly has provided a statutory general reassessment property tax rate rollback in Section 137.073.2, as enacted by Senate Committee Substitute for House Substitute for House Committee Substitute for House Bills Nos. 1022, 1032 and 1169, Eighty-Third General Assembly, Second Regular Session (hereinafter sometimes referred to as "S.C.S.H.S.H.C.S.H.B. 1022, 1032 and 1169"), which states:

> 2. Whenever changes in assessed valuation that result from a general reassessment of real property within the county are entered in the assessor's books, the county clerk in all counties and the assessor of St. Louis city shall notify each political subdivision wholly or partially within the county of the change in valuation, and each political subdivision wholly or partially within the county, including municipalities maintaining their own tax books, shall immediately revise the rates of levy for each purpose for which taxes are levied to the extent necessary to produce from all taxable property, including state assessed property, substantially the same amount of tax revenue as was produced in the previous year and, in addition thereto, a percentage of the previous year's revenues, equal to the preceding valuation factor of the political subdivision.

Thus, under the facts hypothesized above, the 1985 general reassessment may have caused either of at least two applicable property tax rate rollbacks: The statutory general reassessment property tax rate rollback in subsection 2 of Section 137.073, as enacted by S.C.S.H.S.H.C.S.H.B. 1022, 1032 and 1169, or its predecessor, and the Hancock Amendment tax rate rollback contained in Missouri Constitution, Article X, Section 22(a).

Subsection 5(2) of Section 137.073, as enacted by S.C.S.H.S.H.C.S.H.B. 1022, 1032 and 1169, provides that each political subdivision is to calculate its tax rate rollback or reduction under both the statutory general reassessment provisions and the Hancock Amendment provisions, if applicable, and is to use the tax rate rollback which produces the lowest tax rate.

Although the Hancock Amendment does not provide a method for increasing a tax rate subsequent to a tax rate reduction, Missouri Constitution, Article X, Section 24(b) allows the General Assembly to enact implementing legislation. Also, Missouri Constitution, Article X, Section 10(c), allows the General Assembly to establish the method of increasing property tax rates in years subsequent to a tax rate reduction. In subsection 5(2) of Section 137.073, as enacted by S.C.S.H.S.H.C.S.H.B. 1022, 1032 and 1169, the General Assembly stated as follows:

> It is further the intent of the general assembly, under the authority of section 10(c) of article X of the Constitution of Missouri, that the provisions of this section be applicable to tax rate reductions or revisions mandated under section 22 of article X of the Constitution of Missouri as to reestablishing tax rates as reduced or revised in subsequent years, enforcement provisions, and other provisions not in conflict with section 22 of article X of the Constitution of Missouri; . . .

The method which the General Assembly has provided for increasing tax rates subsequent to a tax rate reduction for third class cities is contained in subsection 6 of Section 137.073, as enacted by S.C.S.H.S.H.C.S.H.B. 1022, 1032 and 1169, which states:

> (1) In all political subdivisions except school districts, the tax rate ceiling established pursuant to this section shall not be exceeded in the year of the tax rate reduction or thereafter unless a higher tax rate is approved by a vote of the people. Approval of the higher tax rate shall be by at least a majority of votes cast, except:
>
> (a) When a higher tax rate, before reduction, would have required approval by at least two-thirds of the votes cast, any vote to exceed the tax rate ceiling shall require approval by at least two-thirds of the votes cast;
>
> (b) When a higher tax rate, before reduction, could have been approved by a

> majority of the votes cast, the maximum tax rate increase that can be approved by a majority after reduction shall be computed as follows: The maximum cumulative percent the original tax rate ceiling can be increased by a majority vote in the future shall be the same percent which the tax rate prior to reduction was exceeded by the maximum tax rate that could be voted by a majority; and
>
> (c) When a higher tax rate, before reduction, would have required approval of the governing body without approval of voters, the tax rate ceiling may be increased by action of the governing body in years following reduction, by the same percentage the rate could have been increased without approval of the voters before the tax rate was reduced. For this purpose any political subdivision that before general reassessment had eliminated its tax rate shall be deemed to have been levying one cent per one hundred dollars valuation before general reassessment.
>
> (2) When the voters approve an increase in the tax rate, the increased tax rate becomes the new tax rate ceiling.
>
> (3) The governing body of any political subdivision except a school district may levy a tax rate lower than its tax rate ceiling and may increase that lowered tax rate to a level not exceeding the tax rate ceiling without voter approval.

We believe that subsection 6, quoted above, applies to increases in tax rates subsequent to a tax rate reduction or revision pursuant to either the statutory general reassessment rollback provisions or the Hancock Amendment tax rate rollback provisions. See Section 137.073.5(2), as enacted by S.C.S.H.S.H.C.S.H.B. 1022, 1032 and 1169, the relevant part of which is quoted above. In fact subsection 6(1) of Section 137.073, as enacted by S.C.S.H.S.H.C.S.H.B. 1022, 1032 and 1169, expressly provides that it applies to tax rate ceilings established pursuant to this section, and subsection 5(2)

thereof requires the calculation of tax rate reductions or revisions under both the general reassessment tax rate rollback provisions and the Hancock Amendment.

Subsection 6 of Section 137.073, as enacted by S.C.S.H.S.H.C.S.H.B. 1022, 1032 and 1169, uses the term "tax rate ceiling", which is defined in subsection 1(4) of Section 137.073, as enacted by S.C.S.H.S.H.C.S.H.B. 1022, 1032 and 1169, as follows:

> 1. As used in this section, the following terms mean:
>
> * * *
>
> (4) "Tax rate ceiling", a tax rate as revised or reduced by the taxing authority to comply with the provisions of this section or when a court has determined the tax rate reduction. This is the maximum tax rate that may be levied in the year of tax rate revision or reduction and in subsequent years, unless a higher tax rate ceiling is approved by voters of the political subdivision as provided in this section;

A.

Maximum Tax Rate Without Voter Approval

Part A of your first question asks what is the City's maximum permissible general operating property tax rate for 1986 which can be enacted by the governing body of the City without voter approval. Under the facts hypothesized, we conclude that the City's maximum permissible general operating levy for 1986 which may be imposed without voter approval is seventy-five cents ($.75) per one hundred dollars ($100.00) assessed valuation.

Section 137.073.6(1), as enacted by S.C.S.H.S.H.C.S.H.B. 1022, 1032 and 1169, provides that the tax rate ceiling established pursuant to that section shall not be exceeded in the year of the tax rate reduction or thereafter unless a higher tax rate is approved by a vote of the people. The definition of the term "tax rate ceiling", in Section 137.073.1(4), as enacted by S.C.S.H.S.H.C.S.H.B. 1022, 1032 and 1169, states that the tax rate ceiling is a tax rate as revised or reduced by the taxing

authority to comply with the provisions of that section. This definition also states that the tax rate ceiling is the maximum tax rate which may be levied in the year of the tax rate reduction or revision and in subsequent years unless a higher tax rate ceiling is approved by the voters of the political subdivision as provided in that section. These statutes establish the proposition that the tax rate ceiling established pursuant to Section 137.073, as enacted by S.C.S.H.S.H.C.S.H.B. 1022, 1032 and 1169, is the maximum tax rate which can be imposed without a vote of the people. Subsection 5(2) of Section 137.073, as enacted by S.C.S.H.S.H.C.S.H.B. 1022, 1032 and 1169, requires political subdivisions to calculate their tax rate rollbacks or revisions under both the statutory general reassessment provisions and the Hancock Amendment provisions. Thus, when a political subdivision establishes its tax rate ceiling pursuant to Section 137.073, as enacted by S.C.S.H.S.H.C.S.H.B. 1022, 1032 and 1169, subsection 6(1) thereof requires it to utilize both the statutory general reassessment rollback provisions and the Hancock Amendment rollback provisions.

You have hypothesized that the City's rollback rate in 1985 is seventy-five cents ($.75) per one hundred dollars ($100.00) of assessed valuation. This is the City's tax rate ceiling under Section 137.073, as enacted by S.C.S.H.S.H.C.S.H.B. 1022, 1032 and 1169, and this rate may not be exceeded without voter approval.

B.

Maximum Tax Rate Which Can Be Authorized By a Simple Majority of the Votes Cast

Part B of your first question asks what is the City's maximum property tax rate for 1986 which can be authorized by a simple majority of the voters. We conclude that the City's maximum general operating levy for 1986 which can be approved by a simple majority of the voters is one dollar ($1.00) per one hundred dollars ($100.00) of assessed valuation.

Section 137.073.6(1), as enacted by S.C.S.H.S.H.C.S.H.B. 1022, 1032 and 1169, states that: "Approval of the higher tax rate shall be by at least a majority of votes cast, except: . . ." This language establishes the general principle that approval of the higher tax rate is by at least a majority of the votes cast, unless one of the exceptions listed in subparagraphs

(a), (b), or (c) of paragraph (1) of subsection 6 of Section 137.073, as enacted by S.C.S.H.S.H.C.S.H.B. 1022, 1032 and 1169, applies.

As previously indicated, prior to the tax rate reduction, the Constitution and statutes allowed the City to impose a one dollar ($1.00) operating levy without voter approval and to increase that levy above one dollar ($1.00) under certain circumstances upon the approval of two-thirds of the voters. As the City was at its maximum nonvoter-approved levy prior to reduction, the exception in subparagraph (c) does not apply. As there was no provision for the increase in tax rates by simple majority vote prior to tax rate reduction, subparagraph (b) does not apply. Also, because we view the one dollar ($1.00) levy, which existed prior to the tax rate reduction, as being a separate levy than that authorized by Missouri Constitution, Article X, Section 11(c), and Section 94.060.1, RSMo 1978, there was no "two-thirds majority tax rate" to reduce prior to reduction. Thus, subparagraph (a) does not apply. As none of the exceptions in subparagraphs (a), (b) or (c) apply, it would appear that Section 137.073.6(1), as enacted by S.C.S.H.S.H.C.S.H.B. 1022, 1032 and 1169, would authorize the City to increase its tax rate ceiling from seventy-five cents ($.75) to one dollar ($1.00) by a simple majority of the votes cast.

C.

Maximum Tax Rate Which Can be Approved by a Two-Thirds Majority of The Votes Cast

Part C of your first question asks what is the City's maximum property tax rate for 1986 which can be authorized by a two-thirds majority of the votes cast. We conclude that if the City is authorized to impose a levy by a two-thirds majority of the votes cast, it can levy up to thirty cents ($.30) above the one dollar ($1.00) levy discussed in part B of your first question; thus, allowing the City to have a total general operating levy of one dollar and thirty cents ($1.30) per one hundred dollars ($100.00) of assessed valuation in 1986.

As we view the City's pre-rollback rate of one dollar ($1.00) as being a separate levy from those authorized in Missouri Constitution, Article X, Section 11(c), and Section 94.060.1, RSMo 1978, which authorize certain "two-thirds majority tax rates", there were no pre-rollback "two-thirds majority tax rates" in existence in the hypothetical which you present. This means that there was no "two-thirds majority tax

rate" to reduce in 1985, and the tax rate rollback statute, Section 137.073, as enacted by S.C.S.H.S.H.C.S.H.B. 1022, 1032 and 1169, does not apply.

Section 94.060.1, RSMo 1978, limits the "two-thirds majority tax rate" to thirty cents ($.30) per one hundred dollars ($100.00) of assessed valuation. Thus, the City may impose an additional levy of thirty cents ($.30) in 1986 with the approval of two-thirds of the votes cast; this levy is in addition to the one dollar ($1.00) levy authorized as discussed in part B of your first question.

D.

Do the Parts B and C Property Tax Maximums Continue Indefinitely?

Part D of your first question asks if the maximum property tax rates referred to in parts B and C of your first question continue indefinitely. We conclude that the maximum property tax rate discussed in part B continues until a conflicting assessment and equalization maintenance plan tax rate ceiling is established under Section 137.115.1(2), as enacted by Conference Committee Substitute for House Committee Substitute for Senate Substitute for Senate Bill No. 476, Eighty-Third General Assembly, Second Regular Session; the part C maximum tax rate lasts for a period not to exceed four (4) years and is subject to any applicable reductions prior to the expiration of the authority to impose this rate.

Discussion of the Simple Majority Tax Rate Ceiling. In part B of your first question, we concluded that the City could increase its tax rate ceiling from seventy-five cents ($.75) to one dollar ($1.00) upon a simple majority vote of the voters. Section 137.073.6(2), as enacted by S.C.S.H.S.H.C.S.H.B. 1022, 1032 and 1169, provides: "When the voters approve an increase in the tax rate, the increased tax rate becomes the new tax rate ceiling." Accordingly, if the voters approve a tax rate increase from seventy-five cents ($.75) to one dollar ($1.00) for the City, the City's new tax rate ceiling becomes one dollar ($1.00) per one hundred dollars ($100.00) assessed valuation. Section 137.073.6(1), as enacted by S.C.S.H.S.H.C.S.H.B. 1022, 1032 and 1169, provides that: "In all political subdivisions except school districts, the tax rate ceiling established pursuant to this section shall not be exceeded in the year of the tax rate reduction or thereafter unless . . . ." (Emphasis added.) Also, the definition of the term "tax rate ceiling" in Section 137.073.1(4), as enacted by

S.C.S.H.S.H.C.S.H.B. 1022, 1032 and 1169, provides that the tax rate ceiling "is the maximum tax rate that may be levied in the year of tax rate revision or reduction and in subsequent years, unless . . . ". (Emphasis added.) However, Section 137.115.1(1), as enacted by Conference Committee Substitute for House Committee Substitute for Senate Substitute for Senate Bill No. 476, Eighty-Third General Assembly, Second Regular Session, requires the reassessment of property in 1987 and in every odd-numbered year thereafter. Paragraph (2) of Section 137.115.1, as enacted by Conference Committee Substitute for House Committee Substitute for Senate Substitute for Senate Bill No. 476, Eighty-Third General Assembly, Second Regular Session, requires political subdivisions to revise their rates of levy in the year any assessment and equalization maintenance plan is implemented. Paragraph (2) also states: "The provisions for setting and revising rates of levy under this section shall prevail in event of conflict with provisions of section 137.073 resulting from implementing an assessment and equalization maintenance plan in each odd-numbered year, and the revised rate determined under this section shall become the tax rate ceiling as defined under section 137.073 and such rate may be increased only in the manner provided by law and the constitution." We do not opine on whether this language requires the revision of tax rates rolled back under the Hancock Amendment.

Therefore, we conclude that if the City obtains simple majority approval of the voters to increase its tax rate from seventy-five cents ($.75) to one dollar ($1.00), the new tax rate ceiling is one dollar ($1.00) per one hundred dollars ($100.00) assessed valuation and this tax rate ceiling continues until a conflicting assessment and equalization maintenance plan tax rate ceiling is adopted under Section 137.115.1(2), as enacted by Conference Committee Substitute for House Committee Substitute for Senate Substitute for Senate Bill No. 476, Eighty-Third General Assembly, Second Regular Session.

Discussion of the "Two-Thirds Majority" Maximum Property Tax Rate. In part C of your first question, we concluded that the City could impose an additional thirty cent ($.30) levy by a two-thirds majority of the votes cast. This levy is limited by Missouri Constitution, Article X, Section 11(c) and Section 94.060.1, RSMo 1978, to a period not to exceed four (4) years. Thus, the City's authority to impose a tax rate upon a vote of two-thirds of the votes cast ceases after four (4) years and is subject to any applicable reductions prior to the expiration of the authority to impose this rate.

E.

New Park Levy

Part E.1 of your first question asks if the governing body of the City desires to enact a new property tax for parks in 1986, what is the maximum rate which can be authorized by the voters. We conclude that the maximum City park tax that can be imposed by a vote of the people in 1986 is forty cents ($.40) per one hundred dollars ($100.00) assessed valuation.

Missouri Constitution, Article X, Section 11(c), provides in part:

> [A]nd provided further, that any county or other political subdivision, when authorized by law and within the limits fixed by law, may levy a rate of taxation on all property subject to its taxing powers in excess of the rates herein limited, for a library, hospital, public health, recreation grounds and museum purposes.

Section 94.070(3), RSMo 1978, states:

> In addition to the levy aforesaid for general municipal purposes, all cities of the third class are hereby authorized to levy annually not to exceed the following rates of taxation on all property subject to its taxing power for the following special purposes:
>
> * * *
>
> (3) For recreational grounds in the manner and at the rate authorized under the provisions of sections 90.500 to 90.570, RSMo.

Section 90.500.1 and .3, RSMo 1978, limit a third class city's park tax to forty cents ($.40) per one hundred dollars ($100.00) assessed valuation.

As no City park tax existed at the time the City's tax rates were reduced, there is no tax rate ceiling under Section 137.073, as enacted by S.C.S.H.S.H.C.S. H.B. 1022, 1032 and 1169, because there was no tax to reduce. Therefore, the maximum City park tax which can be imposed by a vote of the

people in 1986 is forty cents ($.40) per one hundred dollars ($100.00) assessed valuation.

Part E.2 of your first question asks whether the City park tax must be approved by a simple majority of the votes cast or by a two-thirds majority. We have found that the tax rate reduction statute, Section 137.073, as enacted by S.C.S.H.S.H.C.S.H.B. 1022, 1032 and 1169, does not apply to new taxes imposed after a tax rate reduction. We find no authority requiring that the City park tax be approved by a two-thirds majority of the votes cast. We conclude that a simple majority approval is sufficient. See Missouri Constitution, Article X, Section 22(a); Section 90.500, RSMo 1978.

II.

Your second question asks:

> II. If an ambulance district 1) was authorized by the voters to levy a property tax rate of $0.15 per $100 assessed valuation at an election prior to 1980, 2) in 1980 levied a property tax of $0.15, 3) in 1984 levied a property tax of $0.15, and 4) in 1985 was required to reduce its property tax rate to $0.08 because of the constitutional and statutory provisions requiring a reduction in property taxes in the year a general reassessment occurs,
>
> A. What is the maximum permissible property tax rate for 1986 which can be enacted by the governing body of the district without voter approval?
>
> B. What is the district's maximum property tax rate for 1986 which can be authorized by a simple majority of the voters?
>
> C. What is the district's maximum property tax rate

for 1986 which can be authorized by a two-thirds majority of the voters?

A.

Maximum Tax Rate Without Voter Approval

Part A of your second question asks what is the maximum 1986 general operating levy that the ambulance district in question can impose without voter approval. We conclude that the ambulance district in question may impose a general operating levy of up to eight cents ($.08) per one hundred dollars ($100.00) of assessed valuation in 1986 without voter approval.

Under Section 190.035, RSMo 1978, the maximum general operating levy for an ambulance district was fifteen cents ($.15) for each one hundred dollars ($100.00) of assessed valuation. In 1984, the limit on the general operating levy of ambulance districts was increased to thirty cents ($.30) per one hundred dollars ($100.00) assessed valuation. Section 190.035, RSMo Supp. 1984.

Under the facts you have hypothesized, however, it is clear that the governing body of the ambulance district may not increase its general operating levy without a vote. See Missouri Constitution, Article X, Section 22(a); Section 137.073.1(4) and .6(1), as enacted by S.C.S.H.S.H.C.S.H.B. 1022, 1032 and 1169. Therefore, the maximum tax rate which the governing body of the ambulance district can impose without voter approval in 1986 is eight cents ($.08) per one hundred dollars ($100.00) assessed valuation.

B.

Maximum Tax Rate With Approval By Simple Majority of the Votes Cast

Part B of your second question asks what is the ambulance district in question's maximum general operating levy for 1986 that can be authorized by a simple majority of the votes cast. We conclude that the ambulance district in question can increase its general operating levy from eight cents ($.08) to sixteen cents ($.16) in 1986 with the approval of a simple majority of the votes cast.

Under the facts you have hypothesized, in 1985, the year of the tax rate reduction, the ambulance district was not at its statutory maximum. The district was levying fifteen cents ($.15) per one hundred dollars ($100.00) assessed valuation and the statutory maximum prior to the tax rate reduction was thirty cents ($.30) per one hundred dollars ($100.00) assessed valuation. It is clear that prior to the tax rate reduction the ambulance district would have had to obtain a simple majority vote to raise its tax rate from fifteen cents ($.15) per one hundred dollars ($100.00) assessed valuation to thirty cents ($.30) per one hundred dollars ($100.00) assessed valuation. Missouri Constitution, Article X, Section 22(a).

As we view the situation, subparagraph (b) of subsection 6(1) of Section 137.073, as enacted by S.C.S.H.S.H.C.S.H.B. 1022, 1032 and 1169, applies. We view that statute as establishing the following formula:

$$\begin{array}{l}\text{Maximum Tax Rate Which Can Be Imposed After A Tax Rate Reduction With The Approval Of A Simple Majority Of The Votes Cast}\end{array} = \begin{array}{l}\text{Maximum Tax Rate Prior To Reduction} \\ \hline \text{Tax Rate Prior To Reduction}\end{array} \times \begin{array}{l}\text{Tax Rate After Reduction}\end{array}$$

Applying this formula to the facts hypothesized, we arrive at the following:

$$\begin{array}{l}\text{Maximum Tax Rate Which Can Be Imposed After Tax Rate Reduction With The Approval Of A Simple Majority Of The Votes Cast}\end{array} = \frac{\$.30}{\$.15} \times \$.08 = \$.16$$

Thus, we conclude that the maximum tax rate which the ambulance district can impose after tax rate reduction with a simple majority vote is sixteen cents ($.16) per one hundred dollars ($100.00) assessed valuation.

C.

Maximum Tax Rate With a
Two-Thirds Majority Vote

Part C of your second question asks what is the ambulance district's maximum property tax rate for 1986 which can be authorized by two-thirds majority of the votes cast. We conclude that the ambulance district cannot increase its general operating levy above the sixteen cent ($.16) level discussed in part B of your second question by approval of a two-thirds majority of the votes cast.

Section 137.073.6(1)(b), RSMo Supp. 1985 (repealed), contained the words, "any increase in the tax rate ceiling beyond that percent shall require approval by at least two-thirds of the votes cast;". Thus, under the prior version of the statute, the ambulance district could increase its general operating fund from sixteen cents ($.16) to thirty cents ($.30) per one hundred dollars ($100.00) of assessed valuation in 1986 with the approval of a two-thirds majority of the votes cast.

This language in Section 137.073.6(1)(b), RSMo Supp. 1985, was repealed by the version of the statute enacted by S.C.S.H.S.H.C.S.H.B. 1022, 1032 and 1169. Accordingly, we conclude that, under the new version of the statute, the ambulance district cannot increase its general operating levy above the sixteen cent ($.16) level discussed in part B of your second question by approval of a two-thirds majority of the votes cast.

III.

Your third question asks:

> III. If a taxing district 1) by statute could have been authorized to levy a property tax of $0.25 per $100 assessed valuation if approved by the voters, 2) at an election prior to 1980 had been authorized by the voters to levy a property tax of $0.10, 3) in 1980 levied a property tax of $0.10, 4) in 1984 levied a property tax of $0.10, and 5) in 1985 was required to reduce its property tax rate to $0.06 because of the constitutional and statutory

provisions requiring a reduction in property taxes the year a general reassessment occurs,

A. What is the maximum permissible property tax rate for 1986 which can be enacted by the governing body of the district without voter approval?

B. What is the district's maximum property tax rate for 1986 which can be authorized by a simple majority of the voters?

C. What is the district's maximum property tax rate for 1986 which can be authorized by a two-thirds majority of the voters?

We assume that the taxing district in question is not a school district, see Section 137.073.7, as enacted by S.C.S.H.S.H.C.S.H.B. 1022, 1032 and 1169, or a fire protection district, see Section 321.244, as enacted by House Bill No. 877, Eighty-Third General Assembly, Second Regular Session. We also assume that the statute mentioned in your question, authorizing the taxing district to levy a property tax of twenty-five cents ($.25) per one hundred dollars ($100.00) assessed valuation by voter approval, requires only a simple majority voter approval.

A.

Maximum Tax Rate Without Voter Approval

Part A of your third question asks what is the maximum permissible property tax rate for 1986 which can be enacted by the governing body of the taxing district without voter approval. We conclude that under Section 137.073.1(4) and .6(1), as enacted by S.C.S.H.S.H.C.S.H.B. 1022, 1032 and 1169, the maximum permissible property tax rate for 1986 which can be enacted by the governing body of the district without voter approval is six cents ($.06) per one hundred dollars ($100.00) assessed valuation.

B.

Maximum Property Tax Rate With Approval of A Simple Majority of the Votes Cast

Part B of your third question asks what is the taxing district's maximum property tax rate for 1986 which can be authorized by a simple majority of the voters. Applying the formula set forth in response to your second question, we arrive at the conclusion that the taxing district's maximum property tax rate for 1986 which can be authorized by a simple majority of the voters is fifteen cents ($.15) per one hundred dollars ($100.00) assessed valuation.

C.

Maximum Property Tax Rate With A Two-Thirds Majority Voter Approval

Part C of your third question asks what is the taxing district's maximum property tax rate for 1986 which can be authorized by a two-thirds majority of the voters. We conclude that the taxing district may not increase its general operating levy above the fifteen cent ($.15) level by a two-thirds majority of the votes cast.

As discussed with regard to part C of your second question, S.C.S.H.S.H.C.S.H.B. 1022, 1032 and 1169 repealed the authority for tax rate increases by a two-thirds vote under Section 137.073.6(1)(b), RSMo Supp. 1985. Therefore, the taxing district in question cannot increase its tax rate by a two-thirds majority of the votes cast.

IV.

Your fourth question asks:

> IV. If a taxing district 1) by statute prior to 1985 was authorized to levy a property tax of $0.10 per $100 assessed valuation if approved by the voters, 2) at an election prior to 1980 had been authorized by the voters to levy a property tax of $0.10, 3) in 1980 levied a property tax of $0.10, 4) in 1984 levied a property tax of $0.10, 5)

in 1985 was required to reduce its property tax rate to $0.04 because of the constitutional and statutory provisions requiring a reduction in property taxes the year a general reassessment occurs, and 6) by statute taking effect September 28, 1985 (which was after the 1985 property tax rate was set) is authorized to levy a property tax of $0.25 if approved by the voters,

A. What is the maximum permissible property tax rate for 1986 which can be enacted by the governing body of the district without voter approval?

B. What is the district's maximum property tax rate for 1986 which can be authorized by a simple majority of the voters?

C. What is the district's maximum property tax rate for 1986 which can be authorized by a two-thirds majority of the voters?

We understand that this hypothetical is designed to deal with county health center taxes. Section 205.010, RSMo 1978 (repealed), established a statutory maximum of ten cents ($.10) per one hundred dollars ($100.00) assessed valuation for county health center taxes. Section 205.010, RSMo Supp. 1985 (which became effective on September 28, 1985), establishes a maximum county health center tax of twenty-five cents ($.25) per one hundred dollars ($100.00) assessed valuation.

A.

Maximum Property Tax Without Voter Approval

Part A of your fourth question asks what is the maximum permissible property tax rate for 1986 which can be enacted by the governing body of the district without voter approval. We conclude that under Section 137.073.6(1), as enacted by

S.C.S.H.S.H.C.S.H.B. 1022, 1032 and 1169, the maximum property tax rate for the district which can be imposed in 1986 without voter approval is four cents ($.04) per one hundred dollars ($100.00) assessed valuation.

B.

Maximum Property Tax for 1986
Which Can Be Approved By
a Simple Majority of the Voters

Section 137.073.4(2) of S.C.S.H.S.H.C.S.H.B. 1022, 1032 and 1169 provides:

> (2) For a political subdivision authorized to submit new or increased tax levies to their voters by legislation adopted in 1985, or in any year in which general reassessment occurs in the county containing the major portion of the political subdivision, the subdivision may levy the full amount authorized by such laws on approval of the vote required by the law and the tax rate ceiling of such political subdivision may be increased to recognize the voted increase.

It has been the general view of this office that county health centers are not "political subdivisions" separate and apart from the county, but, rather, county health centers are an agency of the county. See, e.g., Opinion No. 225, Banta, 1974. Therefore, this language is not applicable to the hypothetical in question.

Because the increase in the statutory maximum for property tax rates from ten cents ($.10) to twenty-five cents ($.25) became effective on September 28, 1985, the taxing district was at its statutory maximum of ten cents ($.10) when the 1985 rates were set. See Section 137.055.1, RSMo 1978 (establishing a September 20 deadline for setting of county taxes); Section 67.110.1, RSMo Supp. 1984 (which establishes a September 1 deadline for setting tax rates in political subdivisions other than counties). Thus, for the reasons discussed with regard to your first question, subparagraphs (a), (b) and (c) of paragraph (1) of subsection 6 of Section 137.073, as enacted by S.C.S.H.S.H.C.S.H.B. 1022, 1032 and 1169, do not apply. The general rule stated in Section 137.073.6(1), as enacted by S.C.S.H.S.H.C.S.H.B. 1022, 1032 and 1169, governs, which

states: "Approval of the higher tax rate shall be by at least a majority of votes cast, . . .". Accordingly, we conclude that the county health center or taxing district in question could increase its property tax rate from four cents ($.04) per one hundred dollars ($100.00) assessed valuation up to twenty-five cents ($.25) per one hundred dollars ($100.00) assessed valuation in 1986 with the approval of a simple majority of the votes cast.

C.

Maximum Tax Rate With a
Two-Thirds Majority Voter Approval

Part C of your fourth question asks what is the taxing district's maximum property tax rate for 1986 which can be authorized by two-thirds majority of the votes cast. We have concluded, in part B of your fourth question, that the taxing district can increase its tax rate up to its statutory maximum by simple majority vote. Voter approval by two-thirds majority of the property tax rate cannot increase the rate above the twenty-five cent ($.25) limitation set forth in Section 205.010, RSMo Supp. 1985.

V.

Your fifth question asks:

> V. If a third class city 1) in 1980 levied a property tax for its General Revenue Fund of $0.60 per $100 assessed valuation, 2) in 1984 levied a property tax for its General Revenue Fund of $0.30, 3) in 1985 was required to reduce its property tax rate for its General Revenue Fund to $0.20 because of the constitutional and statutory provisions requiring a reduction in property taxes the year a general reassessment occurs,
>
> > A. What is the city's maximum permissible property tax rate for 1986 for its General Revenue Fund which

can be enacted by the governing body of the city without voter approval?

B. What is the city's maximum property tax rate for 1986 for its General Revenue Fund which can be authorized by a simple majority of the voters?

C. What is the city's maximum property tax rate for 1986 for its General Revenue Fund which can be authorized by a two-thirds majority of the voters?

A.

Maximum Tax Rate Without Voter Approval

Part A of your fifth question asks what is the maximum permissible general operating levy for 1986 which can be enacted by the governing body of the City without voter approval. We conclude that the City can impose a general operating levy of up to forty cents ($.40) per one hundred dollars ($100.00) of assessed valuation in 1986 without voter approval.[1]

Immediately prior to the tax rate reduction, the City's general operating levy was thirty cents ($.30). The City's 1980 general operating levy was sixty cents ($.60) per one hundred dollars ($100.00) assessed valuation. Thus, in 1984, immediately preceding the tax rate reduction, the City was below its Hancock Amendment limit. See Missouri Constitution, Article X, Section 22(a). Accordingly, immediately prior to the tax rate reduction the City could have increased its general operating levy from thirty cents ($.30) to sixty cents ($.60) without voter approval.

As we view the situation, subparagraph (c) of paragraph (1) of subsection 6 of Section 137.073, as enacted by S.C.S.H.S.H.C.S.H.B. 1022, 1032 and 1169, applies. We believe the following formula sets forth the requirements in subparagraph (c):

$$\text{Maximum Tax Rate After Reduction Which Can be Imposed Without Voter Approval} = \frac{\text{Maximum Tax Rate Prior to Reduction}}{\text{Tax Rate Prior to Reduction}} \times \text{Tax Rate After Reduction}$$

Applying the above formula to the facts hypothesized, we calculate the maximum property tax rate which can be imposed without voter approval as follows:

$$\text{Maximum Tax Rate After Reduction Which Can be Imposed Without Voter Approval} = \frac{\$.60}{\$.30} \times \$.20 = \$.40$$

B.

Maximum Tax Rate With Approval By
By a Simple Majority of the Votes Cast

Part B of your fifth question asks what is the City's maximum 1986 general operating levy which can be imposed with the approval of a simple majority of the votes cast. We conclude that the City may increase its 1986 general operating levy from the forty cent ($.40) level discussed in part A of your fifth question up to one dollar ($1.00) per one hundred dollars ($100.00) assessed valuation by simple majority vote.

The forty cent ($.40) levy discussed in part A of your fifth question becomes a new tax rate ceiling. When one applies paragraph (1) of Section 137.073.6, as enacted by S.C.S.H.S.H.C.S.H.B. 1022, 1032 and 1169, it is possible to construe the statute so that subparagraph (c) applies again; however, we do not believe the General Assembly intended to so limit the taxing authority of political subdivisions. We view subparagraph (c) as an expression of the limitations placed on nonvoter-approved tax levy increases. We also find subparagraph (b) inapplicable, because a higher tax rate before reduction could have been approved by the governing body and need not have been approved by the voters. Thus, the general rule in Section 137.073.6(1), as enacted by S.C.S.H.S.H.C.S.H.B. 1022, 1032 and 1169, applies, which allows increases in the tax rate upon the approval of a simple majority of the votes cast. The maximum amount for the City's operating levy is the one dollar ($1.00) limit set out in Missouri Constitution, Article X, Section 11(b).

C.

Maximum Tax Rate With Approval By
A Two-Thirds Majority of the Votes Cast

Part C of your fifth question asks what is the City's maximum 1986 general operating levy which can be imposed with the approval of two-thirds majority of the votes cast. We conclude that the City may impose an additional thirty cent ($.30) levy over and above the one dollar ($1.00) levy discussed in part B of your fifth question under Missouri Constitution, Article X, Section 11(c) and Section 94.060.1, RSMo 1978.

VI.

Your sixth question asks:

> VI. If a third class city 1) had an assessed valuation in 1985 which was less than its assessed valuation in 1984 as a result of the general reassessment which occurred in 1985, 2) in 1980 levied a property tax for its General Revenue Fund of $1.00 per $100 assessed valuation, 3) in 1984 levied a property tax for its General Revenue Fund of $1.00, 4) would have had to levy in 1985 a property tax for its General Revenue Fund of $1.50 to bring in from property taxes substantially the same amount of revenue as was brought in from property taxes in 1984 but actually only levied in 1985 a property tax of $1.00 because the city deemed that to be its limit as provided by Article X, Section 11(b) of the Missouri Constitution,
>
> A. What is the city's maximum permissible property tax rate for 1986 for its General Revenue Fund which can be enacted by the governing body of the city without voter approval?
>
> B. What is the city's maximum property tax rate for 1986

for its General Revenue Fund which can be authorized by a simple majority of the voters?

C. What is the city's maximum property tax rate for 1986 for its General Revenue Fund which can be authorized by a two-thirds majority of the voters?

A.

Maximum Tax Rate Without Voter Approval

Part A of your sixth question asks what is the City's maximum 1986 general operating levy which can be imposed without voter approval. We conclude that the City may impose a levy of up to one dollar ($1.00) per one hundred dollars ($100.00) assessed valuation in 1986 without voter approval.

Subsection 2 of Section 137.073, as enacted by S.C.S.H.S.H.C.S.H.B. 1022, 1032 and 1169, requires political subdivisions to revise their tax rates in the year of a general reassessment to produce "substantially the same amount of tax revenue as was produced in the previous year and, in addition thereto, a percentage of the previous year's revenues equal to the preceding valuation factor of the political subdivision." See, also, Section 137.073.1(4) and .6(1), as enacted by S.C.S.H.S.H.C.S.H.B. 1022, 1032 and 1169 (allowing the setting of tax rate ceilings by "revision"). Following this language, the City would have imposed a one dollar and fifty cent ($1.50) levy in 1985. However, the City's constitutional maximum for the levy in question was one dollar ($1.00) per one hundred dollars ($100.00) assessed valuation. See Missouri Constitution, Article X, Section 11(b).

Section 137.073.4(3), as enacted by S.C.S.H.S.H.C.S.H.B. 1022, 1032 and 1169, provides:

> (3) For a political subdivision revising a tax rate in a year of general reassessment which experiences a reduction in the amount of assessed valuation for that year, due to decisions of the state tax commission or a court under sections 138.430 to 138.433, RSMo, or due to clerical errors

> or corrections in the calculations or recordation of any assessed valuation:
>
> (a) Such political subdivision may revise the tax rate ceiling for each purpose it levies taxes to compensate for the reduction in assessed value occurring after the political subdivision calculated the tax rate ceiling in the year of general reassessment, for purposes of taxes levied in the year following general reassessment and subsequent years. Such revision by the political subdivision shall be made at the time of the next calculation of the tax rate after the reduction in assessed valuation has been determined;
>
> (b) In addition, only in the year following the reduction in assessed valuation as a result of circumstances defined in subdivision (3) of subsection 4 of this section, such political subdivision may levy a tax rate for each purpose it levies taxes above the tax rate ceiling adjustment provided in paragraph (a) of this subdivision to recoup any revenues it was entitled to receive for the prior year;
>
> (c) Provided, any adjustments in tax rates and tax rate ceilings permitted by this subdivision shall not exceed a rate limit specified in statute or the constitution or levels previously approved by voters.

Under the circumstances hypothesized in your sixth question, subparagraphs (a) and (b) of Section 137.073.4(3), as enacted by S.C.S.H.S.H.C.S.H.B. 1022, 1032 and 1169, would appear to allow the City to impose a one dollar and fifty cent ($1.50) levy in 1986, if the conditions set forth in such subparagraphs are met. However, subparagraph (c) of Section 137.073.4(3), as enacted by S.C.S.H.S.H.C.S.H.B. 1022, 1032 and 1169, limits the adjustments under subparagraphs (a) and (b) to rate levels specified in a statute or the Constitution. Thus, the City is limited to a nonvoter-approved levy of one dollar ($1.00) in 1986 if Section 137.073.4(3), as enacted by S.C.S.H.S.H.C.S.H.B. 1022, 1032 and 1169, applies.

If the above-quoted statute does not apply, then subsections .1(4), .2 and .6(1) of Section 137.073, as enacted by S.C.S.H.S.H.C.S.H.B. 1022, 1032 and 1169, do not authorize the revision of tax rates to rates higher than those authorized by Missouri Constitution, Article X, Section 11(b).

B.

Maximum Tax Rate With Approval By
A Simple Majority of the Votes Cast

Part B of your sixth question asks what is the City's maximum 1986 general operating levy which can be authorized by a simple majority of the votes cast. We conclude that the City cannot increase its 1986 general operating levy above the one dollar ($1.00) levy discussed in part A of your sixth question with approval of a simple majority of the votes cast.

Because the assessed valuation of the City decreased in the year of the general reassessment, there was no tax rate rollback and Section 137.073, as enacted in S.C.S.H.S.H.C.S.H.B. 1022, 1032 and 1169, does not apply. There is no authority by which the City may increase its 1986 general operating levy by simple majority vote.

C.

Maximum Tax Rate With Approval By
A Two-Thirds Majority of the Votes Cast

Part C of your sixth question asks what is the City's maximum 1986 general operating levy which can be authorized by two-thirds of the votes cast. We conclude that the City may impose an additional thirty cent ($.30) levy with the approval of two-thirds of the votes cast. See Missouri Constitution, Article X, Section 11(c); Section 94.060.1, RSMo 1978.

CONCLUSION

It is the opinion of this office that the political subdivisions and taxing authorities in question may impose property tax rates up to the maximums discussed herein.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

NOTES

1. We note that the definition of "tax revenue" in Section 137.073.1(5) was revised by S.C.S.H.S.H.C.S.H.B. 1022, 1032 and 1169 to provide: "For purposes of political subdivisions which were authorized to levy a tax in the year prior to general reassessment but which did not levy such tax, the term 'tax revenue', as used in relation to the reduction or revision of tax levies mandated by law for the year of general reassessment or a subsequent year, shall mean that amount which such political subdivisions would have received in their fiscal year which included or ended on December thirty-first of the year prior to general reassessment had they levied the tax they were authorized to levy in that same fiscal year." This provision was not in effect in 1985 when the city in your hypothetical calculated its tax rate ceiling. We do not believe the City is authorized to recalculate its 1985 tax rate ceiling to take into account this revision in the definition of "tax revenue". Where the legislature has intended revisions enacted by S.C.S.H.S.H.C.S.H.B. 1022, 1032 and 1169 to result in a recalculation of the tax rate ceiling initially calculated in 1985, the legislature has expressly so provided. See the recalculation permitted due to annexations in 1985 contained in Section 137.073.1(5) and Section 137.073.4(3), as enacted by S.C.S.H.S.H.C.S.H.B. 1022, 1032 and 1169.

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

June 4, 1986

OPINION LETTER NO. 69-86

FILED
69

Mr. Douglas Abele
Prosecuting Attorney, Cooper County
422 East Spring Street
Boonville, Missouri 65233

Dear Mr. Abele:

This letter is in response to your questions asking:

(a) Does the County Commission have authority to withhold funds remaining in the assessment or reassessment accounts [i.e., funds withheld under Sections 137.720 and 137.750(3)] at the end of any year for purposes of applying such funds to correct undercharges to taxing authorities in previous years, or must funds withheld and remaining in the assessment or reassessment accounts at the end of any year be refunded to the taxing authority notwithstanding undercharges for prior years?

(b) What time period is permissible for the correction of errors made in the distribution of ad valorem taxes by the County Collector (i.e., is there a statute of limitations applicable to this situation)?

(c) Is there a difference between the County Commission's authority to withhold and offset overcharges and undercharges for prior years between Sections 137.720 RSMo., and Sections 137.570 [sic], RSMo.?

Your opinion request indicates that the Cooper County Collector undercharged certain taxing authorities, including

the Boonville R-I School District, for assessment and reassessment through costs for the years 1979 through at least 1983, and possibly 1985.

Section 137.720, RSMo Supp. 1984, states:

> A percentage of all ad valorem property tax collections allocable to each taxing authority within the county and the county shall be deducted from the collections of taxes each year and shall be deposited into the assessment fund of the county as required under section 137.750. The percentage shall be one-half of one percent for all counties of the first and second class and cities not within a county and one percent for counties of the third and fourth class. The county shall bill any taxing authority collecting its own taxes. The county may also provide additional moneys for the fund. Every county shall provide all moneys necessary to assume that the fund is at least equal to the amount of moneys available for assessment purposes in the previous year. Any amount which is attributable to deductions under this section remaining in the fund each year after payment of all costs shall be paid to the taxing authority.

Section 137.750.2(3), RSMo Supp. 1984, states in part:

> The amount to be paid by each taxing authority shall be on the percentage basis that the tax proceeds received by such taxing authority for the preceding year bears to the total tax proceeds received by all such taxing authorities within the county during that same preceding year. The county collector shall estimate the costs which will be incurred pursuant to the approved plan for the following year and which are allocable to each local taxing authority. A percentage of all ad valorem property tax collections allocable to each taxing authority, except the state, based on the percentage basis determined as provided in this subdivision shall be deducted by the collector from the collections of taxes due on December thirty-first of that year. The

> collector shall bill any taxing authority collecting its own taxes for that taxing authority's proportionate share of the costs incurred pursuant to the approved plan. Such taxing authority shall pay its proportionate share out of such funds as the governing body of that taxing authority may designate. Funds so deducted or paid shall be deposited in the fund provided for in subsection 7 of this section.

A.

Authority to Withhold Funds

In Missouri Attorney General Opinion No. 82, Moseley, 1980, copy enclosed, this office indicated that the county collector may withhold funds remaining in the reassessment account at the end of the year for purposes of satisfying previous undercharges to the political subdivision by stating:

> Insofar as undercharges are concerned, your question is more difficult. It can be argued that since the legislature has not prescribed a procedure for recovery by the county with respect to undercharges that no such recovery may be had. It is our view, however, that the entire purpose of these provisions was to set up an equitable system for paying for reassessment costs. The legislature has provided precisely how the parties will bear the cost and having so provided, it seems clear that the collector has the right to make up for any undercharge by adding such amounts and calculating future deductions. That the legislature must have intended this result seems all the more obvious when it is considered that the legislature has authorized the collector to bill any taxing authority collecting its own taxes for that taxing authority's proportionate share of the costs incurred pursuant to the approved plan. Thus, we believe that the county has a legally enforceable right to receive each taxing authority's appropriate share of the costs incurred pursuant to the approved plan. Accordingly, if voluntary payment is not made by the undercharged taxing authority, it is proper in this situation for the collector to make

up for the undercharges by making deductions from future taxes collected for the undercharged taxing authority.

Accordingly, we conclude that the county collector may withhold funds remaining in the assessment and reassessment accounts for the purpose of reconciling those accounts for previous undercharges.

B.

Statute of Limitations

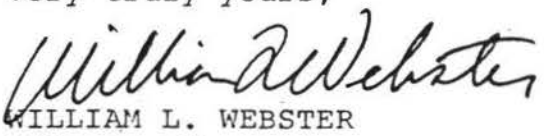
It is arguable that the five-year statute of limitations found in Section 516.120(2), RSMo 1978, applies. See State ex rel. Robb v. Poelker, 515 S.W.2d 577 (Mo. banc 1974). However, even if that is so, the question remains as to whether the claims at issue accrue on a periodic basis or are treated as part of an open account. See Section 516.160, RSMo 1978. It is our view that the statutory assessment fund is more in the nature of a trust account than a simple county account, because it involves funds of the various taxing authorities which are pledged to assessment purposes. See State ex rel. Com'rs of State Tax Commission v. Davis, 621 S.W.2d 511 (Mo. banc 1981). Further, it is axiomatic that statutes of limitations do not generally extinguish the debt but only suspend the legal remedy. Accordingly, we do not believe that there is any applicable period of limitations in the premises which would bar the adjustment of such errors.

C.

Differences Between
Sections 137.720 and 137.750, RSMo Supp. 1984.

Although the statutory language of both Sections 137.720 and 137.750, RSMo Supp. 1984, is not identical, we believe there is no difference in the county collector's authority to withhold and offset overcharges and undercharges for prior years.

Very truly yours,



WILLIAM L. WEBSTER
Attorney General

Enclosure:
Opinion No. 82, Moseley, 5/21/80

ATTORNEY GENERAL OF MISSOURI

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June 4, 1986

OPINION LETTER NO. 72-86

FILED
72

The Honorable Mark A. Youngdahl
Representative, District 9
415 Kirkpatrick Building
St. Joseph, Missouri 64501

Dear Representative Youngdahl:

This letter is in response to your question asking:

> Does paragraph number 2 of Section 89.020, RSMo 1985, as amended, relating to group homes which requires their inclusion in single family residential districts apply to a Constitutional Charter City such as St. Joseph, Missouri?

Section 89.020 2, RSMo Supp. 1985, provides:

> 2. For the purpose of any zoning law, ordinance or code, the classification single family dwelling, or residence shall include any home in which eight or fewer unrelated mentally retarded or physically handicapped persons reside, and may include two additional persons acting as houseparents or guardians who need not be related to each other or to any of the mentally retarded or physically handicapped persons residing in the home. In the case of any such residential home for mentally retarded or physically handicapped persons, the local zoning authority may require that the exterior appearance of the home and property be in reasonable conformance with the general neighborhood standards. Further, the local zoning authority may establish reasonable standards regarding the density of such individual homes in any specific single family dwelling neighborhood.

The Honorable Mark A. Youngdahl

Section 19(a) of Article VI, Missouri Constitution, provides:

> Any city which adopts or has adopted a charter for its own government, shall have all powers which the general assembly of the state of Missouri has authority to confer upon any city, provided such powers are consistent with the constitution of this state and are not limited or denied either by the charter so adopted or by statute. Such a city shall, in addition to its home rule powers, have all powers conferred by law.

Under Section 89.010, RSMo 1978, the provisions of Sections 89.010 to 89.140 apply to all cities, towns and villages in the state.

There does not appear to be any doubt that the provisions of Section 89.020 2 apply to constitutional charter cities. See State ex inf. Hannah ex rel. Christ v. City of St. Charles, 676 S.W.2d 508, 513 (Mo. banc 1984).

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

ATTORNEY GENERAL OF MISSOURI

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May 28, 1986

OPINION LETTER NO. 74-86

FILED
74

Mr. Charles E. Kruse
Director
Missouri Department of Agriculture
1616 Missouri Boulevard
Jefferson City, Missouri 65101

Dear Mr. Kruse:

This official opinion is issued in response to your request for a ruling received on May 17, 1986, setting forth the following questions:

1. For purposes of registration and voting in a beef merchandising council referendum pursuant to § 275.330(3), RSMo Supp. 1984, should the numbers of cattle purchased and sold by order buyers, traders, dealers, or sale barn owners in the ordinary course of their business be included in the total of beef production, a majority of which must be represented by a majority of those voting in favor of adoption of the petition to establish the Council?

2. In the event that the petition referred to in question No. 1 is adopted, are order buyers, traders, dealers or sale barn owners required to pay fees for cattle purchased and sold by them in the ordinary course of their business?

Section 275.300, RSMo Supp. 1984 provides:

> (5) "Handler", any person who engages in the selling, marketing, or distribution of any agricultural commmodity on a wholesale basis which he has purchased for resale or which he is marketing on behalf of a producer, and shall include a producer who distributes any agricultural commodity which he has produced.

* * *

> (7) "Producer", any individual, firm, corporation, partnership, or unincorporated association engaged within this state in business producing for market any agricultural commodity in commercial quantities.

Section 275.330, RSMo Supp. 1984 provides:

> 3. If a majority of the votes cast are in favor of adoption, and if those producers voting in favor of adoption represent a majority of the production of all registered producers casting votes, the petition is adopted.

Section 275.350, RSMo Supp. 1984 provides:

> Fees, collection of, disposition.-1. Any fee imposed under the commodity merchandising program shall be collected by the director whether directly from the producers or indirectly from the handlers or processors as stipulated by the provision of the commodity merchandising program.

Section 276.605, RSMo Supp. 1984 provides:

> (2) "Engaged in the business of buying or selling in commerce livestock", sales and purchases of greater frequency than the person would make in feeding operation under the normal operation of a farm, if the person is a farmer. If the person is not a farmer he is a dealer engaged in the business of buying or selling commerce livestock:
>
> * * *
>
> (4) "Livestock dealer", any person, not a market agency, engaged in the business of buying or selling in commerce livestock, either on his own account or as the employee or agent of the vendor or purchaser;

Section 275.330(3), RSMo Supp. 1984, provides that a majority of producers representing a majority of beef production must vote in favor of adoption of the beef merchandising council petition to result in its adoption.

Section 275.300(7), RSMo Supp. 1984, defines "producer" as an entity engaged within the State of Missouri in business producing for market any agricultural commodity, in this instance cattle.

The first question presented herein is whether the cattle purchased and sold by order buyers, traders, dealers, or sale barn owners in the ordinary course of their business constitutes production of cattle by producers within the meaning of § 275.300. The answer to this question is guided by another statute § 276.605 (4) which defines "livestock dealer" as any person engaged in the business of buying or selling in commerce livestock, either on his own account or as the employee or agent of the vendor or purchaser. Furthermore, such sales and purchases are of greater frequency than the person would make in a feeding operation under the normal operation of a farm.

It is clear that the term "livestock dealer" is a general term meant to embrace the other categories of cattle dealings denominated in your question, e.g. an order buyer who buys as an agent for a purchaser, etc. It is also clear that § 275.300, RSMo Supp. 1984, differentiates a producer from a "handler" who merely engages in the selling of cattle on a wholesale basis. The term "handler" therefore includes "livestock dealers" within the meaning of § 276.605.

Further insight into the distinction between production and marketing functions in the cattle business is obtained by a review of pertinent sections of Harl's treatise Agriculture Law, vol. 12, § 114.02[1]:

> The production and marketing of livestock, most importantly cattle and swine, represent one of the most significant segments of American agriculture. State regulation of agriculture affects livestock production in two main ways: first, as it relates to the control of animal diseases; second, as it relates to the various stages of marketing livestock. . .
>
> Legislation affecting animal markets consists of two main types. The first type relates to the sale of live animals. Within this category are included state legislation relating to the licensing of livestock dealers, the regulation of public livestock auctions, and the control of the movement of live animals. The second type of animal

> marketing legislation relates to the conversion of live animals into meat products for human consumption. . . .

The author then proceeds to describe the various state dealer and auction statutes in the United States. These sections thereby elucidate further what is apparent from a reading of the Missouri statute sections referred to hereinabove, namely, that in interpreting the term "producing for market", it is the order buyers, traders and other livestock dealers which are and constitute the market itself for which the producer produces. It follows that the numbers of cattle purchased and sold pursuant to transactions in such a market are not includable in production totals, a majority of which is required by a corresponding majority of producer votes for adoption of a beef merchandising council petition.

Our attention is drawn to language contained in article eight of the petition, which purports to define producer as the legal owner of one or more head of cattle. Elsewhere in the petition reference is made to cattle "produced and/or sold." While obviously incomplete, we note that such "definition" is not incompatible with or contradictory to the statutory definition, which, of course, cannot be contravened or abrogated merely by the presence of somewhat different language in a petition.

It is apparent that emphasis is being placed on legal ownership of cattle, to distinguish situations of custodial management of cattle. Producers cannot produce cattle for market except through the conveyance of some interest legal or equitable in the animals they raise. In the context of this petition the definitional language of article eight must be deemed instructive in nature and not self-limiting in intent.

In response to your second question, we refer to § 275.350, RSMo Supp. 1984, which directs that the fee imposed under the merchandising program be collected either from the producer directly or from the handler indirectly. Since we have concluded that a handler is not a producer, we conclude also that a fee should not be collected from both the producer and a handler or handlers who comprise the market. A handler may be required, in appropriate circumstances which the Director of Agriculture may identify, to collect the fee on his behalf, but no additional fee is to be collected from him or upon any subsequent wholesale transaction.

It is the conclusion of this office that handlers including order buyers, traders, dealers and sale barn owners are not producers within the meaning of § 275.300 and § 275.330(3), and the numbers of cattle involved in their marketing transactions are not includable in production totals applicable to § 275.330(3). Further, transactions in which title to cattle merely changes hands in the marketing process are not subject to collection of beef merchandising council fees.

Sincerely yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

dk

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July 28, 1986

OPINION LETTER NO. 78-86

The Honorable Patrick J. Hickey
Representative, District 83
3648 Taylor
Bridgeton, Missouri 63044

FILED
78

Dear Representative Hickey:

This letter is in response to your question asking:

> In the absence of a state law or state authorization, may a local governmental body such as a county commission or city council enact an ordinance prohibiting compulsory union membership or support by an employee?

In your request you point out specifically that at the time of the opinion request several local governmental bodies including Caruthersville, Steele, and Hayti, Missouri, as well as the Pemiscott County Commission, have enacted "Human Rights and Employment Practices Acts" including so-called "right-to-work ordinances" which prohibit employee discrimination based on membership or support of a union. We note that none of the political subdivisions involved possess charters.

I.

Federal Preemption

The initial inquiry which must be addressed is whether the United States Congress has preempted the field of regulation of union security agreements to the extent that local political subdivisions of a state have no power to legislate in the field, as it affects interstate commerce.

Section 14(b) of the National Labor Management Relations Act, as amended, 29 U.S.C. Section 164(b), provides:

> (b) Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a

> condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

In Kentucky State AFL-CIO v. Puckett, 391 S.W.2d 360 (Ct. App. Ky. 1965), the court held this language preempted cities from enacting right-to-work ordinances. The Court stated: "We believe Congress was willing to permit varying policies at the state level, but could not have intended to allow as many local policies as there are local political subdivisions in the nation." 391 S.W.2d at 362.

However, in Chavez v. Sargent, 52 Cal.2d 162, 339 P.2d 801, 809 (banc 1959) (disapproved on other grounds, Petri Cleaners, Inc. v. Automotive Employees, Laundry Drivers and Helpers Local No. 88, 53 Cal.2d 455, 2 Cal. Rptr. 470, 349 P.2d 76 (banc 1960)), the court indicated that the National Labor Management Relations Act would not preempt a local right-to-work ordinance if the employer's business did not have any relation to interstate commerce.

Thus, local right-to-work ordinances are preempted by the National Labor Management Relations Act if such relate to interstate commerce based on the principles in the above-cited cases. There are no Missouri cases on this subject.

II.

Authority to Enact Right-to-Work Ordinances

Statutory-class cities and noncharter counties have only those powers expressly granted to them, those powers implied in or incidental to those expressly granted them, and those powers essential to the municipality. Anderson v. City of Olivette, 518 S.W.2d 34, 39 (Mo. 1975); State ex rel. City of Blue Springs v. McWilliams, 335 Mo. 816, 74 S.W.2d 363, 364 (banc 1934; Lancaster v. Atchison County, 352 Mo. 1039, 180 S.W.2d 706 (banc 1944). Because there is no state law authorizing statutory-class cities and noncharter counties to enact right-to-work ordinances, either expressly or impliedly, statutory-class cities and noncharter counties may not enact right-to-work ordinances.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

BANKS:
SECRETARY OF STATE:
SECURITIES:

(1) Section 362.105.1(13), as enacted by House Bill No. 1207, Eighty-Third General Assembly, Second Regular Session, requires the licensing and registration of bank personnel engaged in selling shares of mutual funds established and maintained by the bank; (2) Section 362.105.1(13), as enacted by House Bill No. 1207, Eighty-Third General Assembly, Second Regular Session, requires banks which establish one or more mutual funds and offer to sell shares of such mutual funds to register as a broker-dealer with the office of the Commissioner of Securities, to consent to supervision and inspection by that office, and to subject themselves to the continuing jurisdiction of the Commissioner of Securities; and (3) Section 362.105.1(13), as enacted by House Bill No. 1207, Eighty-Third General Assembly, Second Regular Session, does not affect the ability of the Commissioner of Securities to enforce his interpretation of Chapter 409, RSMo, requiring bank sales personnel who engage in activities other than ministerial duties in connection with the purchase and sale of investment securities to be registered as agents of a registered broker-dealer.

June 24, 1986

OPINION NO. 82-86

FILED
82

The Honorable Joseph L. Driskill
Representative, District 154
Post Office Box 412
Doniphan, Missouri 63935

Dear Representative Driskill:

This opinion is in response to your questions asking:

> (1) Does § 362.105(13) require licensing and registration of bank sales personnel who purchase and sell investment securities for the account of customers?
>
> (2) Does § 362.105(13) require banks which purchase and sell investment securities for the account of customers to register as a broker-dealer with the office of the Commissioner of Securities and consent to supervision and inspection by that office and be subject to the continuing jurisdiction of that office?

> (3) Does § 362.105(13) allow the Commissioner of Securities to enforce that office's prior position that bank sales personnel who engage in activities other than ministerial duties in connection with the purchase and sale of investment securities be registered as agents of a registered broker-dealer?

Background

Section 409.201(a), RSMo 1978, makes it unlawful for a person to transact business in this state as a broker-dealer or an agent unless such person is appropriately registered.

Section 409.401(b) and (c), RSMo 1978, defines the terms "agent" and "broker-dealer" as follows:

> 409.401. Definitions. -- When used in this act, unless the context otherwise requires:
>
> * * * *
>
> (b) "Agent" means any individual (including an individual who is a broker-dealer, a partner, officer or director of a broker-dealer, or a person occupying a similar status or performing similar functions) who represents a broker-dealer or issuer in effecting or attempting to effect purchases or sales of securities. ...
>
> (c) "Broker-dealer" means any person engaged in the business of effecting transactions in securities for the account of others or for his own account. "Broker-dealer" does not include (1) an agent (but an individual who is a broker-dealer may also be an agent), (2) an issuer, (3) a bank, savings institution, or trust company ...

(Emphasis added.)

Chapter 409, RSMo, contains no definition of the term "bank" as used in that chapter.

15 U.S.C. Section 78c(a)(4) and (5) define the terms "broker" and "dealer" for purposes of the Securities Exchange Act of 1934 to exclude "banks", unless the context otherwise requires. On July 1, 1985, the Securities and Exchange Commission finalized its Rule 3b-9, 17 C.F.R. Section 240.3b-9, 50 Fed. Reg. 28394 (July 12, 1985), defining the contexts in which "banks" would be considered to be acting as a broker-dealer under the Securities Exchange Act of 1934.

In October 1984, the Missouri Commissioner of Securities took the position, in his Monthly Securities Bulletin, that "if a bank employee is doing anything other than pointing out a toll-free telephone or providing new account forms with a mail drop for such forms, that bank employee must be registered as an agent of a registered broker-dealer."

House Bill No. 1207

House Bill No. 1207, Eighty-Third General Assembly, Second Regular Session, enacted Section 362.105.1(13), which states:

> Every bank and trust company created under the laws of this state may for a fee or other consideration, directly or through a subsidiary company, and upon complying with any applicable licensing statute:
>
> * * *
>
> (13) Purchase and sell investment securities, without recourse, solely upon order and for the account of customers; and establish and maintain one or more mutual funds and offer to the public shares or participations therein. Any bank which engages in such activity shall comply with all provisions of chapter 409, RSMo, regarding the licensing and registration of sales personnel for mutual funds so offered, provided that such banks shall register as a broker-dealer with the office of the commissioner of securities and shall consent to supervision and inspection by that office and shall be subject to the continuing jurisdiction of that office.

(Emphasis added.)

Your first question asks if Section 362.105.1(13) requires the licensing and registration of bank sales personnel who purchase and sell investment securities for the account of customers. The relevant language in Section 362.105.1(13) states: "Any bank which engages in such activity shall comply with all provisions of chapter 409, RSMo, regarding the licensing and registration of sales personnel for mutual funds so offered, ..." (Emphasis added.) The issue is whether the "activity" referred to is the purchasing and selling of investment securities for others and the establishment of mutual funds and the offering of such mutual fund shares for sale or merely the establishment of mutual funds and the offering of such mutual fund shares for sale.

We believe that the "activity" referred to in Section 362.105.1(13) is the establishment of mutual funds and the offering of such mutual fund shares for sale. This conclusion is supported by the language in Section 362.105.1(13) stating that the provisions of Chapter 409, RSMo, referred to are those "regarding the licensing and registration of sales personnel for mutual funds so offered, ..." (Emphasis added.)

Accordingly, Section 362.105.1(13) requires the licensing and registration of bank personnel engaged in selling shares in mutual funds established and maintained by such banks.

Your second question asks if Section 362.105.1(13) requires banks which purchase and sell investment securities for the account of customers to register as a broker-dealer with the office of the Commissioner of Securities, to consent to supervision and inspection by that office, and to be subject to the continuing jurisdiction of that office. The statutory language imposes the requirements listed in your question upon "such banks". We believe the reference to "such banks" in Section 362.105.1(13) includes only those banks which establish one or more mutual funds and offer their mutual funds' shares for sale. Accordingly, Section 362.105.1(13) requires banks which establish one or more mutual funds and offer their funds' shares to the public to register as a broker-dealer with the office of the Commissioner of Securities, to consent to supervision and inspection by that office, and to be subject to the continuing jurisdiction of that office.

Your third question asks if Section 362.105.1(13) allows the Commissioner of Securities to enforce his position, taken in October of 1984, that bank sales personnel who engage in activities other than ministerial duties in connection with the purchase and sale of investment securities be registered as

agents of a registered broker-dealer. The introductory language in subsection 1 of Section 362.105 empowers Missouri-chartered banks and trust companies to engage in the enumerated activities "upon complying with any applicable licensing statute: ..." Thus, Section 362.105.1(13) does not exempt banks from any licensing requirements and does not directly affect the regulations in Chapter 409, RSMo.

CONCLUSION

It is the opinion of this office that: (1) Section 362.105.1(13), as enacted by House Bill No. 1207, Eighty-Third General Assembly, Second Regular Session, requires the licensing and registration of bank personnel engaged in selling shares of mutual funds established and maintained by the bank; (2) Section 362.105.1(13), as enacted by House Bill No. 1207, Eighty-Third General Assembly, Second Regular Session, requires banks which establish one or more mutual funds and offer to sell shares of such mutual funds to register as a broker-dealer with the office of the Commissioner of Securities, to consent to supervision and inspection by that office, and to subject themselves to the continuing jurisdiction of the Commissioner of Securities; and (3) Section 362.105.1(13), as enacted by House Bill No. 1207, Eighty-Third General Assembly, Second Regular Session, does not affect the ability of the Commissioner of Securities to enforce his interpretation of Chapter 409, RSMo, requiring bank sales personnel who engage in activities other than ministerial duties in connection with the purchase and sale of investment securities to be registered as agents of a registered broker-dealer.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

ATTORNEY GENERAL OF MISSOURI

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September 4, 1986

OPINION LETTER NO. 87-86

Joseph J. O'Hara, Director
Department of Social Services
Post Office Box 1527
Jefferson City, Missouri 65102

FILED
87

Dear Mr. O'Hara:

This letter is in response to your questions asking:

> Are nurse-midwives authorized to practice nurse-midwifery under current Missouri law?
>
> Federal regulations define a nurse-wife as a registered professional nurse who is authorized to practice under state law and who is certified by the American College of Nurse-Midwives or eligible for certification. 42 USC 1396d(m); 42 CFR §440.165(b).
>
> Federal law defines nurse-midwife services as those services provided by a qualified nurse-midwife which (1) are concerned with the care of mothers and babies throughout pregnancy, labor, birth, and six weeks after birth; (2) are furnished within the scope of practice authorized by State law and to the extent permitted by the facility in which the services are rendered; and (3) are reimbursed without regard to whether the nurse-midwife is under the supervision of a physician unless this is required by State law or the regulations of the facility. 42 CFR §440.165(a).
>
> Federal law requires that the State Medicaid Plan provide coverage of nurse-midwife services for the categorically needy to the

> extent nurse-midwives are authorized to practice under State law. 42 USC §1396a(10)(A); 42 USC §1396d(a)(17); 42 CFR §440.210.
>
> If nurse-midwives are authorized to practice in Missouri, to what extent are they authorized to practice?

(Emphasis in original.)

Your opinion request indicates that the current Missouri Medicaid Plan, in effect since July 1, 1982, does not allow for the reimbursement of nurse-midwife services on the ground that nurse-midwives are not authorized to practice in Missouri.

In State ex rel. Missouri State Board of Registration for the Healing Arts v. Southworth, 704 S.W.2d 219, 221 n.2 (Mo. banc 1986), the court stated:

> 2. Section 334.010, RSMo 1978, provides that "[i]t shall be unlawful for any person not now a registered physician within the meaning of the law to ... engage in the practice of midwifery in this state, except as herein provided" (emphasis added). There are no longer any provisions for the licensing of midwives, except that § 334.260, RSMo 1978, provides: "On August 29, 1959, all persons licensed under the provisions of chapter 334, RSMo 1949, as midwives shall be deemed to be licensed as midwives under this chapter and subject to all the provisions of this chapter." Additionally, the provisions of Chapter 334, and thus § 334.010, do not apply to specified professions, including "nurses licensed and lawfully practicing their profession within the provisions of chapter 335, RSMo." Section 334.155, RSMo.Cum.Supp.1984. See Sermchief v. Gonzales, 660 S.W.2d 683 (Mo. banc 1983).

(Emphasis in original.)

Joseph J. O'Hara, Director

We assume for purposes of this opinion that you are not concerned with the "grandfather" clause in Section 334.260, RSMo 1978. Rather, we understand your questions to involve the "nursing" exemption to the prohibition on midwifery in Section 334.010, RSMo 1978.

In Sermchief v. Gonzales, 660 S.W.2d 683, 689 (Mo. banc 1983), the court indicated that the 1975 amendments to the Nursing Practices Act eliminated the requirement that a physician directly supervise nursing functions and created an "open-ended" definition of professional nursing. The court stated: "We believe this phrase [-- the open-ended definition of professional nursing --] evidences an intent to avoid statutory constraints on the evolution of new functions for nurses delivering health services." Id. The court then went on to sanction nurses performing the following functions pursuant to standing orders and protocols approved by physicians: "breast and pelvic examinations; laboratory testing of Papanicolaou (PAP) smears, gonorrhea cultures, and blood serology; the providing of and giving of information about oral contraceptives, condoms, and intrauterine devices (IUD); the dispensing of certain designated medications; and counseling services and community education." 660 S.W.2d at 684 and 689.

Based upon our reading of Gonzales, we believe nurse-midwifery generally comes within the definition of "professional nursing" in Section 335.016(8), RSMo 1978; therefore, nurse-midwives are exempt from the prohibitions in Section 334.010, RSMo 1978, by virtue of Section 334.155, RSMo Supp. 1984, and are generally authorized to practice nurse-midwifery under current Missouri law. Accordingly, Opinion No. 79, Domke, 1972, is hereby withdrawn.

Your second question regarding the extent to which nurse-midwives can practice in Missouri cannot be answered in the abstract. However, to the extent that the practice does not come within the definition of "professional nursing" in Section 335.016(8), RSMo 1978, or such practice is not performed by a registered professional nurse, such conduct is prohibited by Section 334.010, RSMo 1978.

Very truly yours,

WILLIAM L. WEBSTER
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June 24, 1986

OPINION NO. 88-86

Mary-Jean Hackwood
Executive Director
Missouri State Employees'
Retirement System
Post Office Box 209
Jefferson City, Missouri 65102

FILED
88

Dear Ms. Hackwood:

This letter is in response to your question asking:

> Does the Deputy Director of Personnel, when assuming the duties of the Director of Personnel become a member of the MOSERS' Board under the provisions of Section 104.450?

Section 104.450, RSMo Supp. 1984, makes the Director of the Personnel Division of the Office of Administration an ex officio member of the Board of Trustees of the Missouri State Employees' Retirement System. Section 104.450 of Senate Substitute for Senate Committee Substitute for House Committee Substitute for House Bill 1496, Eighty-Third General Assembly, Second Regular Session (which becomes effective on August 13, 1986), terminates the Director of the Personnel Division of the Office of Administration's ex officio status as a member of the Board of Trustees of the Missouri State Employees' Retirement System on December 31, 1987.

Section 37.005.8, RSMo Supp. 1984, provides for the selection of a Personnel Director of the Personnel Division of the Office of Administration. Section 36.090.4, RSMo Supp. 1984, provides as follows:

> 4. The director shall appoint, in full conformity with all the provisions of this chapter, a deputy or deputies. In case of the absence of the director or his

> inability from any cause to discharge the powers and duties of his office, such powers and duties shall devolve upon his deputy.

Section 104.450, RSMo Supp. 1984, places the duty of serving as a member of the Board of Trustees of the Missouri State Employees' Retirement System upon the Director of the Personnel Division of the Office of Administration. When the Deputy Director of the Personnel Division assumes the duties of the Director of the Personnel Division under Section 36.090.4, RSMo Supp. 1984, the Deputy Director of the Personnel Division also assumes the duty of serving as a member of the Board of Trustees of the Missouri State Employees' Retirement System under Section 104.450, RSMo Supp. 1984.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

CITIES, TOWNS AND VILLAGES:
LIQUOR CONTROL:
OBSCENE PUBLICATIONS:
PORNOGRAPHY:

Section 573.080, RSMo Supp. 1984, (1) does not preempt a municipality from enacting an ordinance regulating the location of adult-oriented bookstores, movie houses, and other businesses which deal in explicit sexual material by means of zoning regulations, (2) preempts a municipality from enacting an ordinance regulating the display of explicit sexual material and material depicting nudity, including bare female breasts, when such material is displayed within the premises of a business establishment in such a fashion as to be visible to minors who enter into the premises, but such material is not otherwise visible from a street, highway, or public sidewalk, or from the property of others, except to the extent such ordinance is in accordance with the provisions of Section 573.040, RSMo 1978, (3) preempts a municipality from enacting an ordinance automatically revoking or suspending the business license of, or leading to the refusal to issue a business license to, one who has been convicted of a state-law violation under Chapter 573, RSMo, (4) does not preempt a municipality from enacting an ordinance regulating alcoholic beverages which has as an effect the regulation of nude dancing by performers, and (5) preempts a municipality from enacting an ordinance regulating the public display of explicit sexual material by means of adopting in its entirety the language of Section 573.010(2), RSMo Supp. 1985, defining the term "displays publicly" and by adding thereto the additional language, "or from any portion of the person's store, or the exhibitor's store or property when items and merchandise other than this material are offered for sale to the public".

October 20, 1986

OPINION NO. 89-86

The Honorable Fred Lynn
Representative, District 137
2215 North Robberson
Springfield, Missouri 65802

FILED
89

Dear Representative Lynn:

This opinion is in response to your questions asking:

> Do the preemption provisions of Section 573.080 RSMo. prohibit a municipality from enacting ordinances which would regulate:

(a) Location of adult-oriented book stores, movie houses, and other businesses that deal in explicit sexual material, by means of zoning regulations? ...

(b) Display of explicit sexual material and material depicting nudity, including bare female breasts, when such material is displayed within the premises of a business establishment in such fashion as to be visible to minors who enter into the premises, but is not otherwise visible from a street, highway, or public sidewalk, or from the property of others? ...

(c) Issuance, suspension, or revocation of a municipal business license under circumstances where a particular individual or business establishment has been convicted for one or more violations of the provisions of Chapter 573 RSMo., by means of utilizing the conviction as a triggering device that would result in refusal to issue a business license, suspension of an existing business license, or revocation of an existing business license for those business establishments dealing in explicit sexual materials? ...

(d) Nude dancing by performers in business establishments which either serve alcoholic beverages on the premises, or permit consumption of alcoholic beverages on the premises? ...

(e) The public display of explicit sexual material by means of adopting in its entirety the language of Section 573.010(2) RSMo. "displays publicly", and by

> adding thereto the additional language "or from any portion of the person's store, or the exhibitor's store or property when items and merchandise other than this material are offered for sale to the public"? ...

We understand your question concerns certain proposed local legislation for the City of Springfield, Missouri, which is a constitutional charter city governed by the provisions of Missouri Constitution, Article VI, Section 19(a). See, e.g., Cape Motor Lodge, Inc. v. City of Cape Girardeau, 706 S.W.2d 208 (Mo. banc 1986). See also Section 71.010, RSMo 1978.

We believe the questions presented relate only to the preemption statute, Section 573.080, RSMo Supp. 1984, and do not relate to the validity of any particular proposed ordinance. With this limitation in mind, our analysis of the questions presented is as follows:

Section 573.080, RSMo Supp. 1984, states:

> The general assembly by enacting this chapter intends to preempt any other regulation of the area covered by section 573.020, to promote statewide control of pornography, and to standardize laws that governmental subdivisions may adopt in other areas covered by this chapter. No governmental subdivision may enact or enforce a law that makes any conduct in the area covered by section 573.020 subject to a criminal or civil penalty of any kind. Cities and towns and counties of the first class having a charter form of government may enact and enforce laws prohibiting and penalizing conduct subject to criminal or civil sanctions under other provisions of this chapter, but the provisions of such laws shall be the same and authorized penalties or sanctions under such laws shall not be greater than those of this chapter.

Section 573.020, RSMo 1978, provides:

> 1. A person commits the crime of promoting pornography in the first degree if, knowing its content and character:
>
> (1) He wholesale promotes or possesses with the purpose to wholesale promote any pornographic material; or
>
> (2) He wholesale promotes for minors or possesses with the purpose to wholesale promote for minors any material pornographic for minors.
>
> 2. Promoting pornography in the first degree is a class D felony.

Section 573.025, RSMo Supp. 1985, provides:

> 1. A person commits the crime of promoting child pornography in the first degree if, knowing its content and character, he photographs, films, videotapes, produces, publishes or otherwise creates child pornography, or knowingly causes another to do so.
>
> 2. Promoting child pornography in the first degree is a class B felony, and upon conviction an additional fine of at least five thousand dollars, but not more than five hundred thousand dollars may be added to any other penalties imposed by law.

Section 573.030, RSMo 1978, provides:

> 1. A person commits the crime of promoting pornography in the second degree if, knowing its content and character, he:
>
> (1) Promotes or possesses with the purpose to promote any pornographic material for pecuniary gain; or
>
> (2) Produces, presents, directs or participates in any pornographic performance for pecuniary gain.
>
> 2. Promoting pornography in the second degree is a class A misdemeanor.

Section 573.035, RSMo Supp. 1985, provides:

> 1. A person commits the crime of promoting child pornography in the second degree if, knowing its content and character, he:
>
> (1) Sells, delivers, exhibits or otherwise makes available, or offers or agrees to sell, deliver, exhibit, or otherwise make available, any child pornography; or
>
> (2) Buys, procures or possesses child pornography with the purpose to furnish it to others.
>
> 2. Promoting child pornography in the second degree is a class D felony, and upon conviction an additional fine of at least five thousand dollars, but not more than five hundred thousand dollars may be added to any other penalties imposed by law.

Section 573.040, RSMo 1978, provides:

> 1. A person commits the crime of furnishing pornographic material to minors if, knowing its content and character, he:
>
> (1) Furnishes any material pornographic for minors, knowing that the person to whom it is furnished is a minor or acting in reckless disregard of the likelihood that such person is a minor; or
>
> (2) Produces, presents, directs or participates in any performance pornographic for minors that is furnished to a minor knowing that any person viewing such performance is a minor or acting in reckless disregard of the likelihood that a minor is viewing the performance.
>
> 2. Furnishing pornographic material to minors is a class A misdemeanor.

Section 573.050, RSMo Supp. 1985, provides:

1. In any prosecution under this chapter evidence shall be admissible to show:

(1) What the predominant appeal of the material or performance would be for ordinary adults or minors;

(2) The literary, artistic, political or scientific value of the material or performance;

(3) The degree of public acceptance in this state and in the local community;

(4) The appeal to prurient interest in advertising or other promotion of the material or performance;

(5) The purpose of the author, creator, promoter, furnisher or publisher of the material or performance.

2. Testimony of the author, creator, promoter, furnisher, publisher, or expert testimony, relating to factors entering into the determination of the issues of pornography, shall be admissible.

3. In any prosecution for promoting child pornography in the first or second degree, the determination that the person who participated in the child pornography was younger than eighteen years of age may be made as set forth in section 568.100, RSMo, or reasonable inferences drawn by a judge or jury after viewing the alleged pornographic material shall constitute sufficient evidence of the child's age to support a conviction.

4. In any prosecution for promoting child pornography in the first or second degree, no showing is required that the performance or material involved appeals to prurient interest, that it lacks serious literary, artistic, political or scientific value, or that it is patently offensive to prevailing standards in the community as a whole.

Section 573.060, RSMo 1978, provides:

> 1. A person commits the crime of public display of explicit sexual material if he knowingly:
>
> (1) Displays publicly explicit sexual material; or
>
> (2) Fails to take prompt action to remove such a display from property in his possession after learning of its existence.
>
> 2. Public display of explicit sexual material is a class A misdemeanor.

Section 573.070, RSMo 1978, provides:

> 1. Whenever material or a performance is being or is about to be promoted, furnished or displayed in violation of sections 573.030, 573.040 or 573.060, a civil action may be instituted in the circuit court by the prosecuting or circuit attorney or by the city attorney of any city, town or village against any person violating or about to violate those sections in order to obtain a declaration that the promotion, furnishing or display of such material or performance is prohibited. Such an action may also seek an injunction appropriately restraining promotion, furnishing or display.
>
> 2. Such an action may be brought only in the circuit court of the county in which any such person resides, or where the promotion, furnishing or display is taking place or is about to take place.
>
> 3. Any promoter, furnisher or displayer of, or a person who is about to be a promoter, furnisher or displayer of, the material or performance involved may intervene as of right as a party defendant in the proceedings.
>
> 4. The trial court and the appellate court shall give expedited consideration to

actions and appeals brought under this section. The defendant shall be entitled to a trial of the issues within one day after joinder of issue and a decision shall be rendered by the court within two days of the conclusion of the trial. No restraining order or injunction of any kind shall be issued restraining the promotion, furnishing or display of any material or performance without a prior adversary hearing before the court.

5. A final declaration obtained pursuant to this section may be used to form the basis for an injunction and for no other purpose.

6. All laws regulating the procedure for obtaining declaratory judgments or injunctions which are inconsistent with the provisions of this section shall be inapplicable to proceedings brought pursuant to this section. There shall be no right to jury trial in any proceedings under this section.

Section 573.010, RSMo Supp. 1985, provides:

As used in this chapter:

(1) "Child pornography" means any material or performance depicting sexual conduct, sexual contact, or a sexual performance as these terms are defined in section 556.061, RSMo, and which has as one of its participants or portrayed actual observers a child under the age of eighteen; provided, that it shall not include material which is not the visual reproduction of a live event;

(2) "Displays publicly" means exposing, placing, posting, exhibiting, or in any fashion displaying in any location, whether public or private, an item in such a manner that it may be readily seen and its content or character distinguished by normal unaided vision viewing it from a street, highway or public sidewalk, or from the property of others;

(3) "Explicit sexual material" means any pictorial or three dimensional material depicting human masturbation, deviate sexual intercourse, sexual intercourse, direct physical stimulation or unclothed genitals, sadomasochistic abuse, or emphasizing the depiction of post-pubertal human genitals; provided, however, that works of art or of anthropological significance shall not be deemed to be within the foregoing definition;

(4) "Furnish" means to issue, sell, give, provide, lend, mail, deliver, transfer, circulate, disseminate, present, exhibit or otherwise provide;

(5) "Material" means anything printed or written, or any picture, drawing, photograph, motion picture film, or pictorial representation, or any statue or other figure, or any recording or transcription, or any mechanical, chemical, or electrical reproduction, or anything which is or may be used as a means of communication. "Material" includes undeveloped photographs, molds, printing plates and other latent representational objects;

(6) "Minor" means any person under the age of eighteen;

(7) "Nudity" means the showing of post-pubertal human genitals or pubic area, with less than a fully opaque covering;

(8) "Performance" means any play, motion picture film, videotape, dance or exhibition performed before an audience;

(9) "Pornographic", any material or performance is pornographic if, considered as a whole, applying contemporary community standards:

(a) Its predominant appeal is to prurient interest in sex; and

(b) It depicts or describes sexual conduct in a patently offensive way; and

(c) It lacks serious literary, artistic, political or scientific value.

In determining whether any material or performance is pornographic, it shall be judged with reference to its impact upon ordinary adults;

(10) "Pornographic for minors", any material or performance, except material which is not the visual reproduction of a live event, is pornographic for minors if it is primarily devoted to description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse;

(11) "Promote" means to manufacture, issue, sell, provide, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or agree to do the same;

(12) "Sadomasochistic abuse" means flagellation or torture by or upon a person as an act of sexual stimulation or gratification;

(13) "Sexual conduct" means acts of human masturbation; deviate sexual intercourse; sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or the breast of a female in an act of apparent sexual stimulation or gratification;

(14) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal;

(15) "Wholesale promote" means to manufacture, issue, sell, provide, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, or to

offer or agree to do the same for purposes of resale.

I.

Zoning Ordinances

Your first question asks whether Section 573.080, RSMo Supp. 1984, preempts a municipality from enacting ordinances regulating the location of adult-oriented bookstores, movie houses, and other businesses which deal in explicit sexual material by means of zoning regulations.

In State ex rel. Glendinning Companies of Connecticut, Inc. v. Letz, 591 S.W.2d 92, 95-96 and 101-103 (Mo. App. 1979), the issue was whether Section 572.100, RSMo 1978 (a statute preempting "any other regulation of the area covered by this chapter [-- a chapter relating to gambling]"), preempted the Supervisor of Liquor Control from promulgating a rule, 11 CSR 70-2.140(12) (now, 11 CSR 70-2.140(10)), prohibiting liquor licensees from allowing any gambling on their licensed premises.

The court stated that the Supervisor's rule was not aimed at gambling per se and did not purport to make gambling unlawful or attach any penalty thereto. Instead, the Supervisor's rule was aimed at the separation of the business of selling alcohol from various species of unlawful activity; i.e., the rule was aimed at the regulation of the sale of alcoholic beverages. Because the purpose behind the rule was the regulation of the business of selling alcoholic beverages and such had only a tangential or consequential effect on gambling, the Supervisor's rule was not preempted by Section 572.100, RSMo 1978. The Glendinning case has been cited with approval in Mid-State Distributing Company v. City of Columbia, 617 S.W.2d 419, 430 n.5 (Mo. App. 1981).

The apparent purpose of the zoning ordinance described in your question would be the appropriate location of structures. Zoning ordinances generally do not prohibit or regulate "pornography" in any sense, nor do they attach any penalty to "pornography". Zoning ordinances are generally aimed at the regulation of the location of structures. Accordingly, under the reasoning used in Glendinning, we conclude that zoning ordinances enacted with the real purpose of regulating the location of adult-oriented bookstores, movie houses, and other businesses which deal in explicit sexual material are not preempted by Section 573.080, RSMo Supp. 1984.

II.

The Display of Explicit Sexual Material Inside Buildings

Your second question asks if Section 573.080, RSMo Supp. 1984, preempts a municipality from enacting ordinances which would regulate the display of explicit sexual material and material depicting nudity, including bare female breasts, when such material is displayed within the premises of a business establishment in such a fashion as to be visible to minors who enter into the premises, but when such material is not visible from a street, highway, or public sidewalk, or from the property of others.

In part, Section 573.080, RSMo Supp. 1984, states a legislative intent to standardize laws which governmental subdivisions may adopt in areas covered by Chapter 573, RSMo, other than the area covered by Section 573.020, RSMo 1978. The statute then states that cities and towns may enact and enforce laws prohibiting and penalizing conduct subject to criminal or civil sanctions under the provisions of Chapter 573, RSMo, other than the provisions of Section 573.020, RSMo 1978, but the provisions of the local laws must be the same as those in Chapter 573, RSMo, and the authorized penalties or sanctions cannot be greater than those specified in Chapter 573, RSMo.

Section 573.060, RSMo 1978, quoted above, creates the crime of Public Display of Explicit Material, which, in part, sanctions a person who displays publicly explicit sexual material. In part, the definition of the term "displays publicly" in Section 573.010(2), RSMo Supp. 1985, quoted above, contains the requirement that the item "may be readily seen and its content or character distinguished by normal unaided vision viewing it from a street, highway or public sidewalk, or from the property of others". Section 573.040, RSMo 1978, creates the crime of Furnishing Pornographic Materials to Minors. "Furnish" is defined in Section 573.010(4), RSMo Supp. 1985, to include "exhibit". "Pornographic for minors" is defined in Section 573.010(10), RSMo Supp. 1985.

As it is the express intent of the General Assembly to standardize laws that governmental subdivisions may adopt in areas covered by Chapter 573, RSMo, other than Section 573.020, RSMo 1978, Section 573.080, RSMo Supp. 1984, preempts a municipality from enacting an ordinance regulating the display of explicit sexual material and material depicting nudity, including bare female breasts, when such material is displayed within the premises of a business establishment in such a fashion as to be visible to minors who enter into the premises,

but such material is not otherwise visible from a street, highway, or public sidewalk, or from the property of others, except to the extent such ordinance is in accordance with the provisions of Section 573.040, RSMo 1978.

III.

Municipal Business Licenses

Your third question asks if Section 573.080, RSMo Supp. 1984, preempts municipalities from enacting ordinances regulating the issuance, suspension, or revocation of a municipal business license under circumstances where a particular individual or business establishment has been convicted of one or more violations of the provisions of Chapter 573, RSMo, by means of utilizing the conviction as a triggering device which would result in refusal to issue a business license, suspension of an existing business license, or revocation of an existing business license for those business establishments dealing in explicit sexual material.

Section 573.080, RSMo Supp. 1984, provides in part: "No governmental subdivision may enact or enforce a law that makes any conduct in the area covered by section 573.020 subject to a criminal or civil penalty of any kind."

An ordinance of the type you describe in your question attaches a civil penalty to conduct in the area covered by Section 573.020, RSMo 1978, which is in addition to those provided by statute. Therefore, under the above-quoted language of Section 573.080, RSMo Supp. 1984, a municipality may not automatically refuse to issue, suspend, or revoke a business license on the ground that the applicant has violated Section 573.020, RSMo 1978.

Section 573.080, RSMo Supp. 1984, also provides in part: "Cities and towns ... may enact and enforce laws prohibiting and penalizing conduct subject to criminal or civil sanctions under other provisions of this chapter, but the provisions of such laws shall be the same and authorized penalties or sanctions under such laws shall not be greater than those of this chapter." We believe the foregoing language prohibits a municipality from enacting ordinances of the type described. See also Sections 561.016, RSMo 1978, and 314.200, RSMo Supp. 1984.

IV.

Nude Dancing in Businesses that Either Sell or Permit Consumption of Alcoholic Beverages on their Premises

Your fourth question asks if Section 573.080, RSMo Supp. 1984, preempts a municipality from enacting an ordinance regulating nude dancing by performers in business establishments which either serve alcoholic beverages or permit the consumption of alcoholic beverages on the premises. To the extent the municipality is authorized to enact an ordinance regulating the serving and consumption of alcoholic beverages on the premises of business establishments, Section 573.080, RSMo Supp. 1984, does not preempt the municipality from regulating nude dancing by performers in such business establishments.

Section 573.030.1(2), RSMo 1978, creates the crime of Promoting Pornography in the Second Degree, and, in part, specifies that one of the ways to commit this crime is to produce, present, direct or participate in any pornographic performance for pecuniary gain under certain conditions. Section 573.010(8), RSMo Supp. 1985, defines the term "performance" to include dancing. Section 573.040.1(2), RSMo 1978, creates the crime of Furnishing Pornographic Materials to Minors, and, in part, specifies that one of the ways to commit this crime is to produce, present, direct or participate in any performance pornographic for minors under certain conditions. Again, Section 573.010(8), RSMo Supp. 1985, defines the term "performance" to include dancing. The last sentence in Section 573.080, RSMo Supp. 1984, prohibits a municipality from enacting an ordinance prohibiting and penalizing conduct subject to criminal or civil sanctions under the provisions of Chapter 573, RSMo, other than Section 573.020, RSMo 1978, unless the contents of the ordinance are the same as the provisions in Chapter 573, RSMo, and the authorized penalties or sanctions under the ordinance are not greater than those in Chapter 573, RSMo.

However, an ordinance aimed at the regulation of alcoholic beverages and having only a tangential or consequential effect on nude dancing would not be preempted by Section 573.080, RSMo Supp. 1984. Queen of Diamonds, Inc. v. McLeod, 680 S.W.2d 289 (Mo. App. 1984) involved an ordinance of the City of St. Louis regulating the sale of intoxicating liquors. The ordinance in question prohibited a liquor licensee from permitting any disorderly conduct, or immoral dancing or lewd or indecent conduct on his licensed premises. The revocation of the liquor license for allowing lewd and indecent conduct on the premises

was upheld. See also Peppermint Lounge v. Wright, 498 S.W.2d 749 (Mo. 1973); Sanders v. City of Bridgeton, 703 S.W.2d 76 (Mo. App. 1985).

Therefore, Section 573.080, RSMo Supp. 1984, does not preempt a municipality from enacting an ordinance regulating alcoholic beverages which has as an effect the regulation of nude dancing by performers.

V.

Adding to the Definition of the Term "Displays Publicly"

Your fifth question asks if Section 573.080, RSMo Supp. 1984, preempts a municipality from enacting an ordinance regulating the public display of explicit sexual material by means of adopting in its entirety the language of Section 573.010(2), RSMo Supp. 1985, defining the term "displays publicly" and adding thereto the following additional language: "or from any portion of the person's store, or the exhibitor's store or property when items and merchandise other than this material are offered for sale to the public".

This question presents essentially the same legal issue as that presented in your second question. We believe the last sentence in Section 573.080, RSMo Supp. 1984, preempts a municipality from enacting the type of ordinance described in your fifth question.

CONCLUSION

It is the opinion of this office that Section 573.080, RSMo Supp. 1984, (1) does not preempt a municipality from enacting an ordinance regulating the location of adult-oriented bookstores, movie houses, and other businesses which deal in explicit sexual material by means of zoning regulations, (2) preempts a municipality from enacting an ordinance regulating the display of explicit sexual material and material depicting nudity, including bare female breasts, when such material is displayed within the premises of a business establishment in such a fashion as to be visible to minors who enter into the premises, but such material is not otherwise visible from a street, highway, or public sidewalk, or from the property of others, except to the extent such ordinance is in accordance with the provisions of Section 573.040, RSMo 1978, (3) preempts a

municipality from enacting an ordinance automatically revoking or suspending the business license of, or leading to the refusal to issue a business license to, one who has been convicted of a state-law violation under Chapter 573, RSMo, (4) does not preempt a municipality from enacting an ordinance regulating alcoholic beverages which has as an effect the regulation of nude dancing by performers, and (5) preempts a municipality from enacting an ordinance regulating the public display of explicit sexual material by means of adopting in its entirety the language of Section 573.010(2), RSMo Supp. 1985, defining the term "displays publicly" and by adding thereto the additional language, "or from any portion of the person's store, or the exhibitor's store or property when items and merchandise other than this material are offered for sale to the public".

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
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June 24, 1986

OPINION LETTER NO. 91-86

Carl M. Koupal, Jr.
Director, Department of
Economic Development
Truman State Office Building
Jefferson City, Missouri 65101

FILED
91

Dear Mr. Koupal:

This letter is in response to your question asking:

> Section 3 of Senate Bill 663, 83rd General Assembly, requires that physicians and surgeons who are on the medical staff of any hospital located in a county which has a population of more than 75,000 inhabitants shall, as a condition to admission to or retention on the hospital medical staff, furnish satisfactory evidence of a medical malpractice insurance policy of at least $500,000. Does the term "physician and surgeon" as used in this section apply to podiatrists licensed under Chapter 330?

Section 3 of Senate Bill No. 663, Eighty-Third General Assembly, Second Regular Session, provides as follows:

> Section 3. 1. Beginning on January 1, 1987, any physician or surgeon who is on the medical staff of any hospital located in a county which has a population of more than seventy-five thousand inhabitants shall, as a condition to his admission to or retention on the hospital medical staff, furnish satisfactory evidence of a medical malpractice insurance policy of at least five hundred thousand dollars. The provisions of this section shall not apply to physicians or surgeons who:
>
> (1) Limit their practice exclusively to patients seen or treated at the hospital; and

> (2) Are insured exclusively under the hospital's policy of insurance or the hospital's self-insurance program.
>
> 2. This section shall not in any way limit or restrict the authority of any hospital in this state to issue rules or regulations requiring physicians or other health care professionals to carry minimum levels of professional liability insurance as a condition of membership on a hospital medical staff.

(Emphasis added.)

Section 1 of Senate Bill No. 663, Eighty-Third General Assembly, Second Regular Session, contains definitions of terms used in Sections 1 to 3 of that Act; however, the terms "physician" and "surgeon" are not defined therein. But see Section 1(2) of Senate Bill No. 663, Eighty-Third General Assembly, Second Regular Session (defining the term "health care professional"). Section 334.021, RSMo 1978, provides as follows:

> Where other statutes of this state use the terms "physician", "surgeon", "practitioner of medicine", "practitioner of osteopathy", "board of medical examiners", or "board of osteopathic registration and examination" or similar terms, they shall be construed to mean physicians and surgeons licensed under this chapter or the state board of registration for the healing arts in the state of Missouri.

Podiatrists are not licensed under Chapter 334, RSMo. Podiatrists are licensed by the State Board of Podiatry under Chapter 330, RSMo.

Accordingly, we conclude that podiatrists are not included in the terms "physician" or "surgeon" as used in Section 3 of Senate Bill No. 663, Eighty-Third General Assembly, Second Regular Session.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

GOLF CARTS: Golf carts do not have to be registered
MOTOR VEHICLES: under Section 301.020, as enacted by House Committee Substitute for House Bills Nos. 1367 and 1573, Eighty-Third General Assembly, Second Regular Session.

August 21, 1986

OPINION NO. 93-86

The Honorable David Doctorian
Senator, District 28
Senate Post Office
State Capitol Building
Jefferson City, Missouri 65101

Dear Senator Doctorian:

This opinion is in response to your questions asking:

(1) Is it legal to operate a three or four wheeled motorized golf cart on the public highways of the state without being registered?

(2) If the answer to (1) is no, what requirements would have to be made for the golf cart to be licensed?

Section 301.020.1 and .4, as enacted by House Committee Substitute for House Bills Nos. 1367 and 1573, Eighty-Third General Assembly, Second Regular Session (effective August 13, 1986) provides in part:

> 301.020. 1. Every owner of a motor vehicle or trailer, which shall be operated or driven upon the highways of this state, except as herein otherwise expressly provided, shall annually file, by mail or otherwise, in the office of the director of revenue, an application for registration on a blank to be furnished by the director of revenue for that purpose containing:
>
> * * *
>
> 4. Anyone who fails to comply with the requirement of this section shall be guilty of a class B misdemeanor.

Section 301.010(8), (23), (25), (26), (30), (42), and (46), as enacted by House Committee Substitute for House Bill No. 1153, Eighty-Third General Assembly, Second Regular Session (effective August 13, 1986) provides:

> 301.010. As used in this chapter and sections 304.010 to 304.040, 304.120 to 304.260 and 307.010 to 307.175, RSMo, the following terms mean:
>
> * * *
>
> (8) "Farm tractor", a tractor used exclusively for agricultural purposes;
>
> * * *
>
> (23) "Motor vehicle", any self-propelled vehicle not operated exclusively upon tracks, except farm tractors;
>
> * * *
>
> (25) "Motorized bicycle", any two-wheeled or three-wheeled device having fully operative pedals capable of propulsion by human power, an automatic transmission and a motor with a cylinder capacity of not more than fifty cubic centimeters, which produces less than two gross brake horsepower, and is capable of propelling the device at a maximum speed of not more than thirty miles per hour on level ground;
>
> (26) "Motortricycle", a motor vehicle operated on three wheels, including a motorcycle while operated with any conveyance, temporary or otherwise, requiring the use of a third wheel;
>
> * * *
>
> (30) "Owner", any person, firm, corporation or association, who holds the legal title to a vehicle or in the event a vehicle is the subject of an agreement for the conditional sale or lease thereof with the right of purchase upon performance of

> the conditions stated in the agreement and with an immediate right of possession vested in the conditional vendee or lessee, or in the event a mortgagor of a vehicle is entitled to possession, then such conditional vendee or lessee or mortgagor shall be deemed the owner for the purpose of this law;
>
> * * *
>
> (42) "Trailer", any vehicle without motive power designed for carrying property or passengers on its own structure and for being drawn by self-propelled vehicle, except those running exclusively on tracks, including a semitrailer or vehicle of the trailer type so designed and used in conjunction with a self-propelled vehicle that a considerable part of its own weight rests upon and is carried by the towing vehicle. The term "trailer" shall not include manufactured homes, as defined in section 700.010, RSMo;
>
> * * *
>
> (46) "Vehicle", any mechanical device on wheels, designed primarily for use on highways, except motorized bicycles and vehicles propelled or drawn by human power, or vehicles used exclusively on fixed rails or tracks.

Section 301.020 requires all owners of motor vehicles or trailers which are operated or driven on the highways of this state to register such with the Director of Revenue, except as otherwise expressly provided. Section 301.010(23) defines the term "motor vehicle" in part as a self-propelled "vehicle". The term "vehicle" is defined in Section 301.010(46) as "any mechanical device on wheels, designed primarily for use on highways, except motorized bicycles and vehicles propelled or drawn by human power, or vehicles used exclusively on fixed rails or tracks." (Emphasis added.)

Although the term "motorized bicycle", as defined in Section 301.010(25), includes certain three-wheeled vehicles, we do not believe most three-wheeled golf carts are motorized bicycles, because most golf carts are not capable of propulsion

by human power. Thus, three-wheeled golf carts are not entitled to the "motorized bicycle" exemption to the definition of the term "vehicle" in Section 301.010(46).

We do not believe, however, that golf carts are designed primarily for use on highways, because golf carts are designed primarily for use on golf courses. As golf carts, both three-wheeled and four-wheeled, are not "vehicles" under the definition of that term in Section 301.010(46), they are not "motor vehicles" under the definition of that term in Section 301.010(23) and do not have to be registered as motor vehicles under Section 301.020. Likewise, three-wheeled golf carts are not considered "motortricycles" under the definition of that term in Section 301.010(26), because golf carts, not being designed primarily for use on the highways, are neither "vehicles" nor "motor vehicles" under the definition of those terms in Sections 301.010(46) and 301.010(23), respectively.

We also find that golf carts are not "trailers" as that term is defined in Section 301.010(42), in part because golf carts generally have motive power. Therefore, golf carts do not have to be registered as "trailers" under Section 301.020.

Accordingly, we find that golf carts do not have to be registered under Section 301.020. However, extensive use of a golf cart on public highways would cause us to question our assumption that a golf cart is designed primarily for use on golf courses and not public highways.

Because our answer to the first question is "yes", the second question is moot.

CONCLUSION

It is the conclusion of this office that golf carts do not have to be registered under Section 301.020, as enacted by House Committee Substitute for House Bills Nos. 1367 and 1573, Eighty-Third General Assembly, Second Regular Session.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION:
SCHOOL FOUNDATION LAW:
SCHOOLS:
TAX RATE ROLLBACK:

"Tax rates levied" for purposes of the School Aid Formula are the school district's tax rates prior to the annual Proposition C tax rate adjustment.

September 12, 1986

OPINION NO. 98-86

The Honorable James R. Strong
Senator, District 6
State Capitol Building, Room 225
Jefferson City, Missouri 65101

FILED
98

Dear Senator Strong:

This opinion is in response to your question asking:

> A question has been raised by a Superintendent of a school district in my Senatorial district concerning the proper interpretation of Section 163.011 (8) and (10), RSMo., as it applies to the apportionment formula for schools.
>
> Under the definition of "operating levy" and "pupil weighted levy" should the State Department of Education be using the rate of levy that may be authorized in each school district or the rate of levy actually levied in each district? In many cases the people of a district have authorized a rate of levy which is in excess of that actually levied because of the various "roll back" provisions in the statutes.

Section 163.011(10), as enacted by House Committee Substitute for House Bill No. 1441, Eighty-Third General Assembly, Second Regular Session, and Section 163.011(10), as enacted by House Substitute for House Committee Substitute for Senate Bill No. 707, Eighty-Third General Assembly, Second Regular Session, define the term "pupil-weighted levy" for purposes of Section 163.031, as enacted by House Substitute for House Committee Substitute for Senate Bill No. 707, Eighty-Third General Assembly, Second Regular Session, using the term "equalized operating levy". The term "operating levy" is defined in Section 163.011(8), as enacted by House Committee Substitute for House Bill No. 1441, Eighty-Third General

Assembly, Second Regular Session, and Section 163.011(8), as enacted by House Substitute for House Committee Substitute for Senate Bill No. 707, Eighty-Third General Assembly, Second Regular Session, in part as "the sum of tax rates levied for teachers, incidental, and building funds." (Emphasis added.)

The issue appears to be whether the tax rate that is "levied" for purposes of the School Aid Formula is the "tax rate ceiling", the tax rate ceiling less any voluntary reduction by the board of education of the school district, or the Proposition C adjusted tax rate (which is the actual rate appearing on the tax bills). For purposes of this opinion, we will use a hypothetical example of a school district (1) which has a tax rate ceiling of three dollars ($3.00) per one hundred dollars ($100.00) assessed valuation, (2) whose board of education has voluntarily chosen to levy a tax rate of thirty cents ($0.30) less than the permitted maximum, and (3) whose reduction in tax rate required by sales tax revenue received under Proposition C is one dollar ($1.00). The property tax rate actually appearing on the tax bills is therefore one dollar and seventy cents ($1.70) per one hundred dollars ($100.00) assessed valuation (the $3.00 tax rate ceiling less the $0.30 voluntary reduction and less the $1.00 Proposition C reduction).

Tax Rate Ceiling. Section 137.073, as enacted by Senate Committee Substitute for House Substitute for House Committee Substitute for House Bills Nos. 1022, 1032 and 1169, Eighty-Third General Assembly, Second Regular Session (hereinafter sometimes referred to as "Section 137.073"), and Missouri Constitution, Article X, Section 22(a), require the reduction of property tax rates under certain conditions. School districts may not increase their tax rates above such reduced rates without complying with the provisions of subsection 7(1) of Section 137.073.

Usually, such tax rate increases require voter approval. See Section 137.073.7(1). When voters consider such a tax rate increase, the ballot is normally in the following form:

> Shall the school board of _____ (name of district) be authorized to increase the tax levy for _____ (list purpose or purposes) by _____ (amount of increase) on one hundred dollars assessed valuation? If this proposition is approved by the voters, the total operating levy of the school district will be _____ (amount) per one hundred dollars of assessed valuation.

Section 164.031, RSMo 1978.

Thus, the voters might approve a total operating levy of three dollars ($3.00) per one hundred dollars ($100.00) assessed valuation. This figure of three dollars ($3.00) would be the school district's tax rate ceiling.

Voluntary Rollbacks. Subsection 7(2) of Section 137.073 provides:

> (2) The governing body of any school district may levy a tax rate lower than its tax rate ceiling and may increase that lowered tax rate to a level not exceeding the tax rate ceiling, without voter approval. As used in this subdivision, the term "tax rate ceiling" shall also include any reductions mandated by section 164.013, RSMo.

(Emphasis added.)

Under the above-quoted provision, school districts can voluntarily roll back their tax rates below the tax rate ceiling. The term "tax rate ceiling" is defined to "include" Proposition C tax rate reductions. Thus, in our hypothetical, the Proposition C tax rate reduction of one dollar ($1.00) per one hundred dollars ($100.00) of assessed valuation is included in the three dollar ($3.00) tax rate ceiling. If, in our hypothetical, the school district wished to levy an amount thirty cents ($0.30) lower than its three dollar ($3.00) tax rate ceiling, its voluntarily rolled back rate would be two dollars and seventy cents ($2.70).

Proposition C Adjusted Tax Rate. Under Section 164.013, RSMo Supp. 1985, the total operating levy is reduced or adjusted annually under a formula which offsets property tax revenues by a certain percentage of the estimated Proposition C sales tax revenues. Thus, the Proposition C adjusted tax rate would be one dollar and seventy cents ($1.70) in the hypothetical above, because the Proposition C adjustment is one dollar ($1.00). It should be noted that the Proposition C adjustment is the last adjustment made to the levy and is changed from year to year. Section 164.013, RSMo Supp. 1985. The Proposition C adjustment is also based on estimates and is sometimes revised to reflect the "true" Proposition C adjustment. Section 164.013, RSMo Supp. 1985.

The annual Proposition C adjustment is just that -- an adjustment -- and does not become a part of a school district's permanent operating levy. Therefore, we conclude that the "tax rates levied" for purposes of the School Aid Formula are the school district's tax rates prior to the annual Proposition C tax rate adjustment. In our hypothetical example, the "tax rate levied" for purposes of the School Aid Formula is two dollars and seventy cents ($2.70) per one hundred dollars ($100.00) assessed valuation.

CONCLUSION

It is the opinion of this office that the "tax rates levied" for purposes of the School Aid Formula are the school district's tax rates prior to the annual Proposition C tax rate adjustment.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

SOIL AND WATER CONSERVATION DISTRICTS AND SUBDISTRICTS:
TAXATION -- GENERAL:
PROPERTY TAX:

Tax revenues derived from subsection 2 of Section 278.250, RSMo 1978, may be used to acquire real and personal property and rights-of-way if the sole purpose in acquiring such is for the construction of present or future works of improvement otherwise authorized by the language of the statute.

September 2, 1986

OPINION NO. 104-86

FILED
104

The Honorable Joseph L. Driskill
Representative, District 154
Post Office Box 412
Doniphan, Missouri 63935

Dear Representative Driskill:

This opinion is in response to your question asking:

> Does Chapter 278 RSMo, or other applicable statutory law give soil and water conservation subdistricts authority to expend revenues collected by the subdistrict as a result of the annual tax specified in Section 278.250, Subsection (2), for the acquisition of real and personal property and for the acquisition of rights of way?

Section 278.250.1 and .2, RSMo 1978, provides:

> 278.250. Organization tax -- annual tax for subdistrict -- limitation -- levy, collection lien, enforcement. -- 1. In order to facilitate the preliminary work of the subdistrict the governing body of the subdistrict or the trustees of the subdistrict, when acting with the approval of the governing body as provided in section 278.240, may levy an organization tax of not to exceed forty cents per one hundred dollars of assessed valuation of all real estate within the subdistrict, the proceeds of which may be used for organization and administration expenses of the subdistrict, the acquisition of real and personal

> property, including easements for rights-of-way, necessary to carry out the purposes of the subdistrict. This levy may be made one time only. The organization tax may be imposed as provided for in subsections 4 and 5.
>
> 2. After the governing body or the trustees of the subdistrict, when acting with the approval of the governing body as provided in section 278.240, have obtained agreements to carry out recommended soil conservation measures and proper farm plans from owners of not less than sixty-five percent of the lands situated in the subdistrict, an annual tax may be imposed for construction, repair, alteration, maintenance and operation of the present and future works of improvement within the boundaries of the subdistrict in order to participate in funds from federal sources appropriated for watershed protection and flood prevention. The annual tax may be imposed as provided for in subsections 4 and 5.
>
> * * *

(Emphasis added.)

It is our understanding that the Fourchee Creek Watershed District, a subdistrict of the Ripley County Soil and Water Conservation District, is involved in the construction of a series of flood control impoundments on privately owned land. The Subdistrict is to acquire flowage rights, road rights-of-way and the actual ownership of the impoundment structure. The Subdistrict has already levied the tax authorized by Section 278.250.1, RSMo 1978, and wishes to use revenues derived from the tax authorized by Section 278.250.2, RSMo 1978, to acquire the flowage rights, road rights-of-way and the ownership of the impoundment structure.

In Missouri Attorney General Opinion No. 83, Slusher, 1960, copy enclosed, this office opined that the authorization to use subsection 2 tax revenues for the "construction ... of the present and future works of improvement" of a subdistrict impliedly authorized the expenditure of the funds for the cost of advertising for bids for construction work, because the advertising for construction bids is a necessary prerequisite

or precondition to construction. Likewise, in Johnson v. Cummings, 281 Ark. 229, 663 S.W.2d 168, 170 (1984), the court was confronted by a constitutional provision that, in part, prohibited the "construction" of a county jail without voter approval. The court indicated that generally the purchase of land does not violate the constitutional provision, because construction does not occur simply because land is purchased or otherwise acquired. However, when the sole purpose of the land acquisition is to acquire the land for the construction of a county jail, then the acquisition of the land is a part of the construction of a county jail. See also Opinion Letter No. 59, Lafser, 1980, copy enclosed.

We believe that revenues derived from subsection 2 of Section 278.250, RSMo 1978, may be used to acquire real and personal property and rights-of-way if the sole purpose in acquiring such is for the construction of a present or future improvement otherwise authorized by the language of subsection 2.

However, if the real or personal property or the rights-of-way are not acquired for construction or the other enumerated purposes, then subsection 2 revenues may not be used for the acquisition.

CONCLUSION

It is the opinion of this office that tax revenues derived from subsection 2 of Section 278.250, RSMo 1978, may be used to acquire real and personal property and rights-of-way if the sole purpose in acquiring such is for the construction of present or future works of improvement otherwise authorized by the language of the statute.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

Enclosures:

Opinion No. 83, Slusher, 1960
Opinion Letter No. 59, Lafser, 1980

COUNTY CLERK:
COUNTY TREASURER:

A deputy county clerk is eligible to be county treasurer under Section 54.040, RSMo 1978, if the deputy county clerk resigns his or her position as deputy prior to the general election.

September 2, 1986

OPINION NO. 108-86

FILED
108

Jeffrey C. Vaughan
Prosecuting Attorney
Mississippi County
Charleston, Missouri 63834

Dear Mr. Vaughan:

This opinion is in response to your question asking if Section 54.040, RSMo 1978, makes the Deputy County Clerk of Mississippi County ineligible for the office of Treasurer of Mississippi County under the following circumstances: The Deputy County Clerk of Mississippi County filed for the office of Mississippi County Treasurer on the Democratic ticket. At the primary election held on Tuesday, August 5, 1986, the Deputy County Clerk of Mississippi County was nominated as the Democratic candidate for the office of Treasurer of Mississippi County. The Deputy County Clerk of Mississippi County does not have any opposition in the general election.

Section 54.040, RSMo 1978, provides as follows:

> No sheriff, marshal, clerk or collector, or the deputy of any such officer, shall be eligible to the office of treasurer of any county.

The precise question you have asked has not heretofore been answered.

In State ex rel. McAllister v. Dunn, 277 Mo. 38, 209 S.W. 110 (banc 1919), the court was faced with the following situation: The Deputy Collector of the City of St. Louis was a candidate for the office of Treasurer of the City of St. Louis and received a majority of the votes cast at the general election. The Deputy Collector held his office as deputy collector until after the general election and until a short time before the term of the Treasurer began. It was conceded that Section 3756, RSMo 1909 (now, Section 54.040, RSMo 1978), applied to the City of St. Louis, which is also a county.

The court in Dunn first held that whether or not the word "eligible" refers to the time of the election or the time of the taking of office depends upon the context and upon the subject. The court went on to hold that as a matter of common law one cannot hold incompatible offices. The court noted that the offices of collector and treasurer were incompatible as a matter of common law. The court said that it is a well-settled rule that the Legislature is not held to have done a vain and useless thing. As it was already prohibited for one person to hold both the offices of collector and treasurer, the court concluded that from the context and subject of that litigation, the word "eligible" referred to the time of being chosen for the office rather than the time of taking the office. Chief Justice Bond in a separate concurring opinion concluded that the term "eligible" as used in statutes or the constitution, without contextual qualification or modificatory terms, refers to the legal capacity to hold an office at the time of the election or appointment of the person designated. Dunn, 209 S.W. at 112.

In Missouri Attorney General Opinion No. 350, Warden, 1968, copy enclosed, this office, after reviewing the Dunn case and State ex inf. Noblet ex rel. McDonald v. Moore, 347 Mo. 1170, 152 S.W.2d 86 (banc 1941), concluded that if a deputy county clerk resigned from his office as deputy county clerk prior to the primary election, he or she would be eligible for the office of county treasurer. At page 2 of this opinion, it is stated "that the question of eligibility is determined at the time the party is chosen treasurer."

From the foregoing, we conclude that if the Deputy County Clerk of Mississippi County resigns his or her office as deputy county clerk prior to the general election at which such deputy may be chosen to be county treasurer, the Deputy County Clerk would remain eligible to be county treasurer under Section 54.040, RSMo 1978. However, if the Deputy County Clerk of Mississippi County remains in office past the time of the general election, the Deputy County Clerk would be ineligible for office under Section 54.040, RSMo 1978.

Jeffrey C. Vaughan

CONCLUSION

It is the opinion of this office that a deputy county clerk is eligible to be county treasurer under Section 54.040, RSMo 1978, if the deputy county clerk resigns his or her position as deputy prior to the general election.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

Enclosure:
Opinion No. 350, Warden, 1968

COUNTIES:
TAXATION -- GENERAL:
TAXATION -- PROPERTY:
TAXATION -- TAX RATE:

The September 20 tax-rate-setting deadline in Section 137.055, RSMo 1978, is directory and not mandatory.

September 4, 1986

OPINION NO. 111-86

FILED
///

Gary G. Sprick
Prosecuting Attorney, Howard County
Post Office Box 89
Fayette, Missouri 65248

Dear Mr. Sprick:

This opinion is in response to your question asking:

> If the voters of Howard County approve an additional tax for a Special Road and Bridge Fund pursuant to §137.555, RSMo, at an election to be held on November 4, 1986, can such tax be collected for 1986 in light of the provisions of §137.055, RSMo, which seems to require the rate of county taxes to be fixed by the County Commission prior to September 20, 1986?

Your opinion request states the facts as follows:

> The County Commission of Howard County has placed a proposition on the ballot to be voted on November 4, 1986, which requests that the voters approve an additional Road and Bridge Fund Tax, pursuant to §137.555, RSMo, for 1986. §137.055, RSMo, states that the County Commission shall fix the various tax rates prior to September 20th of each year. A question has arisen as to whether the tax could be levied and collected for 1986, if approved by the voters of the November election.

Section 137.555, RSMo 1978, provides that counties may, in their discretion, levy a tax not exceeding thirty-five cents ($.35) on each one hundred dollars ($100.00) of assessed valuation to be collected and turned over to the Special Road

and Bridge Fund to be used for road and bridge purposes; provided, however, that four-fifths of the revenues derived from property located within any special road district is paid over to such road district. In Missouri Attorney General Opinion No. 14-83, copy enclosed, this office concluded that Article X, Section 12(a) of the Missouri Constitution is self-enforcing and that the thirty-five cent ($.35) limit in Section 137.555 must yield to the constitutional authorization of a levy of fifty cents ($.50), but that nothing in the Constitution repeals the provision of Section 137.555 requiring the transfer of four-fifths of the additional tax, arising from property lying in any special road district, to such special road district. See also Missouri Attorney General Opinion No. 129, Lybyer, 1979, copy enclosed.

Section 137.055.1, RSMo 1978, provides:

> 1. After the assessor's book of each county, except in the city of St. Louis, shall be corrected and adjusted according to law, but not later than September twentieth, of each year, the county governing body shall ascertain the sum necessary to be raised for county purposes, and fix the rate of taxes on the several subjects of taxation so as to raise the required sum, and the same to be entered in the proper columns in the tax book.

In Missouri Attorney General Opinion No. 101, Hines, 1974, copy enclosed, and Missouri Attorney General Opinion No. 167, Schwartze, 1978 (withdrawn), this office took the position that statutes establishing a deadline for the setting of taxes are directory, unless some consequence or penalty is attached to failure to comply with the deadline. The 1978 opinion was withdrawn in light of the 1981 amendments to Section 67.110.1, RSMo, which establish certain consequences for failure to comply with the tax rate setting deadline in Section 67.110.1, RSMo.

We have examined Section 137.055, RSMo 1978, and find that the General Assembly has not specified any consequence or penalty for failure to comply with the tax rate setting deadline established therein. Accordingly, under the reasoning of our prior opinions, we conclude that the tax rate setting deadline in Section 137.055, RSMo 1978, is directory and not mandatory. This means that if the voters approve an additional county special road and bridge tax at the November 4, 1986 general election, such tax can be collected for 1986, even though the rate for such tax is certified after September 20, 1986.

CONCLUSION

It is the conclusion of this office that the September 20 tax-rate-setting deadline in Section 137.055, RSMo 1978, is directory and not mandatory.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

Enclosure

DRIVING WHILE INTOXICATED:
JURISDICTION:
JUVENILES:
TRAFFIC OFFENSES:

A sixteen-year-old juvenile arrested for a first offense of driving while intoxicated (Section 577.010, RSMo Supp. 1984) is not within the exclusive original jurisdiction of the juvenile court because a first offense of driving while intoxicated is a state traffic ordinance or regulation, the violation of which does not constitute a felony.

October 20, 1986

OPINION NO. 112-86

Larry H. Ferrell
Prosecuting Attorney
Cape Girardeau County
Common Pleas Courthouse
Cape Girardeau, Missouri 63701

Dear Mr. Ferrell:

This opinion is in response to your question asking:

> Does the juvenile court have exclusive original jurisdiction in cases where a sixteen year old juvenile has violated the state driving while intoxicated law (577.010, RSMo) by committing a first offense of driving while intoxicated, or is driving while intoxicated considered a state "traffic offense" for the purposes of Section 211.031(3) so that the juvenile court would not have jurisdiction over the sixteen year old juvenile?

Section 211.031.1, RSMo Supp. 1984, provides in part:

> Juvenile court to have exclusive jurisdiction when -- exceptions. --
> 1. Except as otherwise provided herein, the juvenile court shall have exclusive original jurisdiction in proceedings:
>
> * * *
>
> (3) Involving any child who is alleged to have violated a state law or municipal ordinance, or any person who is alleged to

> have violated a state law or municipal ordinance prior to attaining the age of seventeen years, in which cases jurisdiction may be taken by the court of the circuit in which the child or person resides or may be found or in which the violation is alleged to have occurred; except that, the juvenile court shall not have jurisdiction over any child sixteen years of age who is alleged to have violated a state or municipal traffic ordinance or regulation, the violation of which does not constitute a felony; [Emphasis added.]

* * *

Section 577.010, RSMo Supp. 1984, provides:

> Driving while intoxicated. -- 1. A person commits the crime of "driving while intoxicated" if he operates a motor vehicle while in an intoxicated or drugged condition.
>
> 2. Driving while intoxicated is for the first offense, a class B misdemeanor. No person convicted of or pleading guilty to the offense of driving while intoxicated shall be granted a suspended imposition of sentence for such offense, unless such person shall be placed on probation for a minimum of two years.

The central issue becomes, is driving while intoxicated a violation of a state traffic ordinance or regulation for purposes of Section 211.031.1, RSMo Supp. 1984? Chapter 211, RSMo, does not define "traffic ordinance or regulation", nor do Chapters 300 through 304, RSMo, dealing with motor vehicles. Therefore, we look to the plain and ordinary meaning of the words to determine the intent of the legislature. State ex rel. D.M. v. Hoester, 681 S.W.2d 449 (Mo. 1984); State v. Adkins, 678 S.W.2d 855 (Mo. App. 1984).

It is the opinion of this office that the legislature intended a first offense driving-while-intoxicated violation to be included in the phrase "traffic ordinance or regulation". While this violation does not appear within the statutory scheme with other traffic violations, it is important to note that a person can only commit "the crime of 'driving while intoxicated' if he operates a motor vehicle while in an intoxicated or

drugged condition". (Emphasis added.) Section 577.010, RSMo Supp. 1984. Likewise, Section 302.302.1(7), RSMo Supp. 1984, includes the offense of driving while intoxicated in its point system scheme for suspension and revocation of chauffeurs' and operators' licenses. This conclusion is consistent with our views expressed in Opinion No. 181, Limbaugh, 1980, a copy of which is enclosed, wherein we concluded that the procedures set out in Section 577.050, RSMo (now repealed), are applicable to sixteen-year-old juvenile offenders. See also State v. Blatnik, 478 N.E.2d 1016 (Ohio App. 1984) wherein the court concluded the prohibition against driving while under the influence of alcohol under the Ohio statutes is a "traffic offense".

CONCLUSION

A sixteen-year-old juvenile arrested for a first offense of driving while intoxicated (Section 577.010, RSMo Supp. 1984) is not within the exclusive original jurisdiction of the juvenile court because a first offense of driving while intoxicated is a state traffic ordinance or regulation, the violation of which does not constitute a felony.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

Enclosure:
Opinion No. 181, Limbaugh, 1980

APPOINTIVE OFFICERS:
ECONOMIC DEVELOPMENT, DEPT. OF:
PROFESSIONAL REGISTRATION, DIV. OF:
STATE OFFICERS:
TERMS OF OFFICE:

The positions of public members on licensing boards within the Division of Professional Registration continue in existence and the terms for public members appointed to such boards are as set forth in the specific enabling statutes for each board. Those members appointed as public members serve in that capacity until their successors are appointed.

October 20, 1986

OPINION NO. 115-86

Carl M. Koupal, Jr., Director
Department of Economic Development
Truman State Office Building, Room 680
301 West High Street
Jefferson City, Missouri 65101

Dear Mr. Koupal:

This opinion is in response to your question asking:

> What is the length of the term for public members appointed to the licensing boards of the Division of Professional Registration?

The answer to your question lies in the interpretation to be placed on Section 620.100, RSMo Supp. 1984, as well as the interpretation placed upon the various enabling statutes relating to each licensing board. The provisions of Section 620.100, RSMo Supp. 1984, were adopted in 1981 as part of House Substitute for House Committee Substitute for Senate Bill No. 16, Eighty-First General Assembly, First Regular Session (hereinafter "Senate Bill No. 16"). Most of the present enabling statutes for the particular licensing boards were also adopted as part of Senate Bill No. 16 in 1981. As more fully set out below, not all such enabling legislation has remained unchanged since 1981.

Section 620.100, RSMo Supp. 1984, provides:

> 1. Nothing in this act is intended, nor shall it be construed, to affect the continuity of any board or commission or any fund of any board or commission. No term of

> any member of any board or commission shall be affected by this act.
>
> 2. No public member added to any board or commission by this act shall be appointed prior to July 1, 1982, and the initial public member on each board or commission shall be appointed prior to September 1, 1982. All provisions of this act relating to the appointment, responsibilities and terms of office of public members as specified in this act shall terminate on September 1, 1986.
>
> 3. No public member added to any board or commission by this act shall be appointed prior to July 1, 1982, and the initial public member on each board or commission shall be appointed prior to September 1, 1982.
>
> 4. Nothing in this act is intended, nor shall it be construed, to affect the license or registration of any person regulated by a board assigned to the division of professional registration.
>
> 5. The provisions of subsections 1 through 3 of this section shall terminate on September 1, 1982.

Subsection 2 of this section provides in part that "[a]ll provisions of this act relating to the appointment, responsibilities and terms of office of public members as specified in this act shall terminate on September 1, 1986." That subsection tends to indicate that the positions of public members of licensing boards established under Senate Bill No. 16 terminate on September 1, 1986. If no provisions other than those in subsection 2 existed, it would appear that the public member position on licensing boards was an experiment and failure of the legislature to pass legislation continuing those positions would result in termination of those positions.

However, subsection 5 of this section provides: "The provisions of subsections 1 through 3 of this section shall terminate on September 1, 1982." The initial "sunset" provisions in subsection 2 may have themselves been "sunsetted" by the provisions of subsection 5.

We are cognizant of the statutory rule of construction that provisions of statutes are to be construed to give each section meaning, if possible. See State v. Sweeney, 701 S.W.2d 420, 423 (Mo. banc 1985); Brown Group, Inc. v. Administrative Hearing Commission, 649 S.W.2d 874, 881 (Mo. banc 1983). To give force and effect to subsection 5 of Section 620.100, RSMo Supp. 1984, would result in nullifying the provisions of subsection 2 relating to the termination of the positions of public members. However, by not construing subsection 5 to "sunset" the provisions in subsection 2 would make the provisions of subsection 5 of no force or effect.

In the various chapters establishing licensing boards, each board has been established through enabling legislation, e.g., Sections 326.160, 327.031 and 332.021, RSMo. The enabling legislation was amended in 1981 under Senate Bill No. 16 establishing the public members for the various licensing boards. The terms of office for the public members of the various licensing boards vary from three to five years. The terms for the Board of Chiropractic Examiners and the Advisory Committee for Professional Counselors are three years, while the terms for the Board of Accountancy, Missouri Dental Board, Board of Embalmers and Funeral Directors, Board of Optometry, Board of Pharmacy, State Committee of Psychologists, and Missouri Real Estate Commission are five years. All other boards' terms are four years. See Sections 326.160, 327.031, 328.030, 329.190, 330.110, 331.090, 332.021, 333.151, 334.120, 335.021, 336.130, 337.050, 337.535, 338.110, 339.120, 340.120, and 346.120, RSMo. The language in those enabling statutes is more specific than that in Section 620.100, RSMo Supp. 1984. Generally, specific language of statutes takes precedence over general language of statutes. See O'Flaherty v. State Tax Commission of Missouri, 680 S.W.2d 153, 154 (Mo. banc 1984); State ex rel. Fort Zumwalt School District v. Dickherber, 576 S.W.2d 532, 536-537 (Mo. banc 1979).

We are also cognizant of the statutory rule of construction that later enacted statutes take precedence over those earlier enacted. Bartley v. Special School District of St. Louis County, 649 S.W.2d 864, 867 (Mo. banc 1983); City of Kirkwood v. Allen, 399 S.W.2d 30, 34 (Mo. banc 1966). In that regard, had provisions of subsection 5 of Section 620.100, RSMo Supp. 1984, been enacted after those of subsection 2, there would be little doubt that subsection 5 would abrogate the provisions of subsection 2. However, said subsections were enacted at the same time.

In this regard, it is important to note that the provisions of Section 332.021, RSMo, were amended in 1983 under Senate Bill

No. 313, Eighty-Second General Assembly, First Regular Session. That legislation re-enacted the position of the public board member for the Missouri Dental Board without establishing that that position or term would terminate on September 1, 1986. As the Missouri Dental Board public member's term is for five years and was originally appointed in 1982, that action by the legislature would tend to show that the legislature intended that the public members of licensing boards are to continue. It certainly indicates that the public board member for the Missouri Dental Board is to continue in existence after September 1, 1986.

In 1985, the legislature adopted legislation creating a new licensing board, that being the Advisory Committee for Professional Counselors. See Section 337.535, RSMo Supp. 1985. That body consists of five members, including a public member, serving three-year terms. This enactment by the legislature is further indication that it intended that the positions of public members on licensing boards were to continue.

The Missouri Constitution provides that members of boards and commissions serve until their successors are appointed. See Missouri Constitution, Article IV, Sections 4 and 51; Missouri Attorney General Opinion No. 203, Banks, 1977. In that regard, a public member appointed to a licensing board with a term of four years will continue to act as a board member until his or her successor is appointed, even if that appointment is after the term of office has expired. Such an interpretation is consistent with the practice as to other members of licensing boards as well as members of other boards and commissions. This interpretation is also consistent with the provisions of Section 620.100.1, RSMo Supp. 1984, wherein it is stated that "[n]othing in this act is intended, nor shall it be construed, to affect the continuity of any board or commission or any fund of any board or commission. No term of any member of any board or commission shall be affected by this act."

We have been advised that in the letters of appointment issued in 1982, the Governor stated that the appointments were for terms ending on September 1, 1986. However, this fact does not affect the answer to your question because the terms of office of public members are established by the various enabling statutes.

Carl M. Koupal, Jr., Director

CONCLUSION

It is the conclusion of this office that the positions of public members on licensing boards within the Division of Professional Registration continue in existence and that the terms for public members appointed to such boards are as set forth in the specific enabling statutes for each board. It is the further conclusion of this office that those members appointed as public members serve in that capacity until their successors are appointed.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

September 29, 1986

OPINION LETTER NO. 118-86

FILED
118

The Honorable John Scott
Senator, District 3
State Capitol Building, Room 416
Jefferson City, Missouri 65101

Dear Senator Scott:

This opinion is in response to your question asking:

> Does Attorney General's Opinion No. 98-1957 apply to the Metropolitan St. Louis Sewer District and particularly does Section 107.170, RSMo 1978, apply to the Metropolitan St. Louis Sewer District?

I understand you are concerned that Section 107.170, RSMo 1978, and the interpretation of that section in Missouri Attorney General Opinion No. 98, Witte, November 8, 1957, may apply to contracts for public works of the Metropolitan St. Louis Sewer District.

Section 107.170, RSMo 1978, provides:

> 107.170. -- Bond -- public works contractor. -- 1. It is hereby made the duty of all officials, boards, commissions, commissioners, or agents of the state, or of any county, city, town, township, school, or road district in this state, in making contracts for public works of any kind to be performed for the state, or for such county, city, town, township, school or road district, to require every contractor for such work to furnish to the state, or to such county, city, town, township, school or

> road district, as the case may be, a bond with good and sufficient sureties, in an amount fixed by said officials, boards, commissions, commissioners, or agents of the state, or of such county, city, town, township, school or road district, and such bond, among other conditions, shall be conditioned for the payment of any and all materials, lubricants, oil, gasoline, grain, hay, feed, coal and coke, repairs on machinery, groceries and foodstuffs, equipment and tools, consumed or used in connection with the construction of such work, and all insurance premiums, both for compensation, and for all other kinds of insurance, on said work, and for all labor performed in such work whether by subcontractor or otherwise.
>
> 2. All bonds executed and furnished under the provisions of this section shall be deemed to contain the requirements and conditions as herein set out, regardless of whether the same be set forth in said bond, or of any terms or provisions of said bond to the contrary notwithstanding.

A copy of Opinion No. 98, Witte, November 8, 1957, (hereinafter "the opinion") is enclosed.

Section 107.170 applies to "contracts for public works of any kind to be performed for the state, or for such county, city, town, township, school or road district. ...". The Metropolitan St. Louis Sewer District was established under the provisions of Article VI, Section 30 of the Missouri Constitution. It is not the state or a county, city, town, township, school or road district. A primary rule of statutory construction, expressio unius est exclusio alterius, is that the enumeration of particular things excludes those not included. Therefore, the Metropolitan St. Louis Sewer District is not subject to Section 107.170.

It follows that the conclusion in the opinion, to the extent it is based upon Section 107.170, is not applicable to contracts for public works entered into by the Metropolitan St. Louis Sewer District. This does not mean, however, that the

The Honorable John Scott

Metropolitan St. Louis Sewer District should not require performance bonds. The mechanism to require such assurance is left to the Metropolitan St. Louis Sewer District.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

Enclosure:
Opinion No. 98, Witte, November 8, 1957

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

December 3, 1986

OPINION LETTER NO. 121-86

FILED
121

Carl M. Koupal, Jr.
Director
Department of Economic Development
Post Office Box 1157
Jefferson City, Missouri 65102

Dear Mr. Koupal:

This letter is in response to your request for an interpretation of the duties of the Director of the Department of Economic Development imposed by Sections 447.500 to 447.585, RSMo, i.e., the "Uniform Disposition of Unclaimed Property Act" and in particular the provisions of Section 447.572, RSMo Supp. 1984, relating to examination of records of persons believed by the Director to have failed to report unclaimed property.

Your specific questions are as follows:

> Does the Department of Economic Development have the authority to conduct examinations of businesses regulated by divisions within the Department without authorization of the appropriate division directors or commissioners?
>
> If the Director does not have such authority, what constitutes adequate notice or involvement by the regulatory division?

Section 447.572, RSMo Supp. 1984, reads as follows:

> 447.572. Examination of records by director and persons authorized -- when. -- The director may at reasonable times and upon reasonable notice examine the records of any person if he has reason to believe that such person has failed to report

> property that should have been reported pursuant to sections 447.500 to 447.585; provided, however, that examination of the records of any person or entity subject to the supervision of the divisions of finance, insurance, credit unions, savings and loan supervision, or the public service commission shall be made by the chief officer of the respective agency at the request of the director. The communications between such chief officers and the director concerning this section shall be considered exceptions to any applicable confidentiality statutes. The director may delegate any duty imposed upon him under the provisions of sections 447.500 to 447.585 to such division officers or other agency employees as he deems appropriate.

(Emphasis added.)

All of the divisions specifically mentioned in Section 447.572 and the Public Service Commission have statutory powers and duties relating to examination of the entities regulated by them. Section 361.160, RSMo 1978, requires annual examination of every bank and trust company organized and doing business under the laws of this state by the Director of the Division of Finance or by the deputy or examiner appointed by him. The Director of the Division of Insurance has authority to make examinations of insurance companies under the provisions of Section 374.190, RSMo. 1978. Authority for annual examinations of credit unions is set forth in Section 370.375, RSMo Supp. 1984. The power to examine savings and loan associations is granted to the Director of the Division of Savings and Loan Supervision by Section 369.334, RSMo Supp. 1984. The Public Service Commission also has extensive regulatory and investigatory powers, including the power of examination as to the entities it regulates, such powers being set forth in Chapter 386, RSMo.

Returning now to your questions relating to the department director's powers of examination under Section 447.572, it is apparent that examination of the records of any person or entity "subject to the supervision of the divisions of finance, insurance, credit unions, savings and loan supervision, or the public service commission" shall be made by "the chief officer of the respective agency at the request of the director." Where the language of a statute is plain and admits of but one meaning, there is no room for construction and courts will apply the

statute as it is written. Kolocotronis v. Ritterbusch, 667 S.W.2d 430 (Mo. App. 1984). It is our opinion, as to those specific, regulated entities, that examination as to whether they have failed to report unclaimed property must proceed through "the chief officer of the respective agency at the request of the director."

We do not understand the second question you have posed. If additional guidance from this office is desired, upon clarification of the question, we will provide our opinion upon the second question.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

November 14, 1986

OPINION LETTER NO. 122-86

FILED
122

James R. Moody, Acting Director
Department of Social Services
P. O. Box 1527
Jefferson City, Missouri 65102

Dear Mr. Moody:

This letter is in response to your question asking:

> Is state legislation required before the State of Missouri can provide Medicaid benefits to qualified pregnant women under Section 9501 of P.L. 99-272?

Your inquiry is made because of questions raised by the enactment of the Consolidated Omnibus Budget Reconciliation Act of 1985, Section 9501(a), 42 U.S.C.A. section 1396d(n)(1) which provides as follows:

> (n) Qualified pregnant woman or child
>
> The term "qualified pregnant woman or child" means --
>
> (1) a pregnant woman who --
>
> (A) would be eligible for aid to families with dependent children under part A of subchapter IV of this chapter (or would be eligible for such aid if coverage under the State plan under part A of subchapter IV of this chapter included aid to families with dependent children of unemployed parents pursuant to section 607 of this title) if her child had been born and was living with her in the month such

> aid would be paid, and such pregnancy has been medically verified;
>
> (B) is a member of a family which would be eligible for aid under the State plan under part A of subchapter IV of this chapter pursuant to section 607 of this title if the plan required the payment of aid pursuant to such section; or
>
> (C) otherwise meets the income and resources requirements of a State plan under part A of subchapter IV of this chapter; and
>
> (2) a child who is . . . .

This enactment amended Section 1396d(n)(1) by adding subparagraph (C) as a third alternative category of pregnant women who can qualify for medical assistance benefits (Medicaid). The question of whether state legislation is required for Missouri law to allow payments of Medicaid benefits to all three categories of pregnant women arises because the federal government will not provide Medicaid funds to this state unless the state has a "state plan" which allows the same people to qualify for Medicaid as the federal statutes require. See, generally, 42 U.S.C.A. sections 1396, 1396a(b) and 1396a(a)(10), (15) and (16). Since the provision of Medicaid benefits involves the expenditure of both state and federal funds by a state agency, the "state plan" cannot provide for Medicaid payments to people unless state statutes allow appropriations for such payments. Therefore, we must look to state statutes to determine whether the state can submit a state plan which will be in compliance with federal law.

Whether state law allows the submission of such a plan determines whether the amendments to Section 1396d(n) became effective July 1, 1986, or whether they will become effective after the next session of the state General Assembly. In this regard, the Consolidated Omnibus Budget Reconciliation Act of 1985, Section 9501(d) provides as follows:

> (d) EFFECTIVE DATES. --
>
> (1) EXPANDED COVERAGE. -- (A) The amendments made by subsection (a) apply (except as provided under subparagraph (B)) to payments under title XIX of the Social

> Security Act for calendar quarters beginning on or after the July 1, 1986, without regard to whether or not final regulations to carry out the amendments have been promulgated by that date.
>
> (B) In the case of a State plan for medical assistance under title XIX of the Social Security Act which the Secretary of Health and Human Services determines requires State legislation (other than legislation appropriating funds) in order for the plan to meet the additional requirement imposed by the amendments made by subsection (a), the State plan shall not be regarded as failing to comply with the requirements of such title solely on the basis of its failure to meet this additional requirement before the first day of the first calendar quarter beginning after the close of the first regular session of the State legislature that begins after the date of the enactment of this Act.

The first two categories of pregnant women qualified to receive Medicaid benefits are set forth in subparagraphs (A) and (B) of the Section 1396d(n)(1). Section 208.151.1(10), RSMo Supp. 1984, provides for the payment of Medicaid funds to pregnant women as follows:

> 208.151. Persons eligible to receive medical assistance. -- 1. For the purpose of paying medical assistance on behalf of needy persons and to comply with Title XIX, Public Law 89-97, 1965 amendments to the Federal Social Security Act (42 U.S.C.A. section 301 et seq.) as amended, the following needy persons shall be eligible to receive medical assistance to the extent and in the manner hereinafter provided:
>
> * * *
>
> (10) Pregnant women who meet the requirements for aid to families with dependent children, except for the existence of a dependent child in the home;
>
> * * *

James R. Moody

The statutory authorizations for making benefits under the Aid to Families with Dependent Children (AFDC) Program are in Sections 208.040 and 208.041, RSMo Supp. 1984, and Section 208.050, RSMo Supp. 1985. A comparison of these provisions with the pertinent federal AFDC statutes, 42 U.S.C.A. sections 602, 606 and 607, warrants the conclusion that state law allows for Medicaid payments to those pregnant women who come within the categories of subparagraphs (A) and (B) of Section 1396d(n)(1).

It is the category of eligibility described in subparagraph (C) which state law does not provide for. For purposes of determining the Medicaid eligibility of a pregnant woman, Section 208.151(10) adopts the eligibility criteria of Missouri's AFDC statutes except for that portion of them which would require the pregnant woman to have a dependent child at the time of applying for or receiving AFDC benefits. The AFDC statutes require, in addition to certain criteria concerning income and resources at Section 208.050(3), RSMo Supp. 1985, that a woman not have the father of the unborn child living in the home unless he is physically or mentally incapacitated, Section 208.040.1(2), RSMo Supp. 1984, or unless the woman and the unborn child's father are unemployed and meet certain other requirements in Section 208.041, RSMo Supp. 1984. In contrast, subparagraph (C) of Section 1396d(n)(1) requires only that the pregnant woman meet the income and resources requirements of AFDC law without regard to the whereabouts or employment status of the father of the unborn child. Therefore, since Section 208.151(10), RSMo Supp. 1984, incorporates by reference certain requirements for Medicaid eligibility which include criteria concerning the whereabouts and employment status of the father of the unborn child, state law does not allow Medicaid benefits to pregnant women who are eligible for such benefits under subparagraph (C) of Section 1396d(n)(1).

It is the opinion of this office that Missouri statutes do not authorize Medicaid benefits for those pregnant women who can qualify for Medicaid benefits only under subparagraph (C) of the Consolidated Omnibus Budget Reconciliation Act of 1985, Section 9501(a), 42 U.S.C.A. section 1396d(n)(1).

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

ECONOMIC DEVELOPMENT, DEPT. OF:
PROFESSIONAL REGISTRATION, DIV. OF:
ACCOUNTANTS:

The Missouri State Board of Accountancy is authorized to commence a positive enforcement program, including the requirement that a licensee submit with the annual registration application samples of financial reports prepared by the licensee.

December 3, 1986

OPINION NO. 125-86

FILED
125

The Honorable John D. Schneider
Senator, District 14
705 Olive Street, Suite 1415
St. Louis, Missouri 63101

Dear Senator Schneider:

This opinion is in response to your question regarding the authority of the Missouri State Board of Accountancy (hereinafter the "Board") to commence a positive enforcement program. Specifically, your question asks:

> As a condition of registering an office as provided for in section 326.055, and pursuant to the rulemaking authority vested in the Board by the legislature to promulgate rules setting the requirements for registration of an office and issuance of permits (326.110.5), and without a complaint having been filed, may the State Board of Accountancy by rule require each office so registered to provide the Board with reports on financial statements (compilation, review and audit) for the purpose of allowing the Board to determine if the reports are substandard as part of the Board's statutory authority to promulgate rules to establish and maintain high standards of competence and integrity in the profession of public accounting (section 326.110.2) and if those reports are determined to be substandard to require that certain remedial measures be taken by the licensee or appropriate disciplinary action be taken by the Board.

The Honorable John D. Schneider

The information you enclosed with your opinion request describes the positive enforcement program as follows:

* * *

> In summary as proposed, the regulations would operate as follows: as a condition for registering a public accounting office in Missouri, and without a complaint having been filed, the Board would require that each public accounting office submit with its annual registration application, one copy of each type of financial report, i.e., a compilation, a review and an audit. If an office did not perform one or more of the types of reports a statement to that effect will be sufficient in lieu of the report. Once received the Board and its delegates will review the financial reports to determine if they have been prepared in conformity with generally accepted accounting principles and generally accepted auditing standards. The proposed rules provide safeguards for protecting confidentiality and proprietary interests. The system is designed so that members of small firms would be reviewing similar size firms and large firms by other larger firms and so forth. If it is determined upon review that the reports fail to comply with professional standards, various levels of remedial action can be required by the Board. As indicated above, the process is designed to determine if financial reports are being prepared properly in order to maintain high standards of competency and to protect the consumers of accounting services.

* * *

The Board is created by statute and therefore has no more and no less authority than that granted it by the legislature in its laws creating and establishing it. State Board of Registration for Healing Arts v. Masters, 512 S.W.2d 150, 161 (Mo. App. 1974). Regulations may be promulgated only to the extent of and within the delegated authority of the statute involved. Osage Outdoor Advertising, Inc. v. State Highway Commission of Missouri, 624 S.W.2d 535 (Mo. App. 1981). The

Board can develop and institute a positive enforcement program only when sanctioned to do so by the legislature.

Section 326.055.2, RSMo Supp. 1984, provides:

> 2. As a condition of registering an office under this section the board may, after November 30, 1982, and after a hearing with the licensee in accordance with section 326.132, for those licensees who have issued reports on financial statements, during the preceding five-year period, which the board has determined to have been substandard, require such licensee applying for registration, to submit to a review and evaluation of the system of quality control (peer review) of the accounting and auditing practice of the licensee. Such reviews shall be made by committees or other certified public accountant firms nominated by the Missouri Society of Certified Public Accountants and accredited by the board in accordance with regulations promulgated by the board. The board shall accept peer review reports filed with federal regulatory agencies, other state boards or professional associations to meet such review requirement if the report on such review conforms to board regulations. However, an addendum to such peer review reports may be required by the board to include any Missouri office of a multistate firm which has issued financial reports or financial statements described in this section.

(Emphasis added.)

It should also be noted that in establishing this program, the Board proposes to protect the individual due process rights involved. Although Section 326.055.2, RSMo Supp. 1984, refers to the necessity of the Board holding a hearing with the licensee in accordance with Section 326.132, RSMo, a section that has been subsequently repealed, the proposed program includes the utilization of a hearing conducted by the Board at which time the licensee may be represented by an attorney, may cross-examine witnesses, may call witnesses, and has appeal rights. This hearing should satisfy the due process rights of the Board's licensees.

Section 326.110.1, RSMo Supp. 1984, provides in part:

> 326.110. Board rulemaking authority -- rules suspension and reinstatement procedure. -- 1. The board shall prescribe rules and regulations consistent with the provisions of sections 326.011 to 326.230; provided, however, nothing herein contained shall be construed as conferring upon the board the authority to issue rules or regulations on any subject affecting the practice of public accountancy by a person previously licensed as a certified public accountant unless specifically authorized by the general assembly. Such rules and regulations may include:
>
> * * *
>
> (2) Rules of professional conduct for establishing and maintaining high standards of competence and integrity in the profession of public accountancy;
>
> * * *
>
> (5) Regulations governing peer review committee accreditation and requirements for registration of an office and issuance of permits;
>
> * * *

The legislature has clearly sanctioned in Section 326.055.2, RSMo Supp. 1984, the peer review aspect of the positive enforcement program. We understand your primary question relates to the authority of the Board to require a licensee to submit with its annual registration application samples of financial reports prepared by the licensee, i.e., a compilation, a review and an audit.

Administrative regulations should be sustained, if reasonable, and will be sustained if they bear rational relationship to articulable state purpose. State ex rel. Kirkpatrick v. Board of Election Commissioners of St. Louis County, 686 S.W.2d 888 (Mo. App. 1985). Validity of an administrative rule or regulation is reviewed in light of the ill sought to be cured and will be sustained unless unreasonable or plainly inconsistent with the enactment. Emily v. Missouri State

Division of Family Services, 570 S.W.2d 783 (Mo. App. 1978). Administrative rules should be reviewed in light of the evil they seek to cure and are not unreasonable merely because they are burdensome. Foremost-McKesson, Inc. v. Davis, 488 S.W.2d 193 (Mo. 1972).

In the information you enclosed with your opinion request, you pointed out the accounting profession has been severely criticized recently for what is perceived to be a failure of self-regulation in the area of professional standards and competency. The Missouri legislature has clearly indicated a desire to establish and maintain high standards of competence and integrity in the profession of public accountancy. This is evident from the provisions in Section 326.110.1(2), RSMo Supp. 1984, which is quoted above, and the enactment of the provisions regarding peer review in Section 326.055, RSMo Supp. 1984, also quoted above. We conclude that the positive enforcement program, including the requirement that a licensee submit with its annual registration application samples of financial reports, is within the authority of the Board. The proposed positive enforcement program is designed to enhance the standards of competence in the profession of public accountancy and is clearly related to providing a meaningful peer review program.

It should also be noted that the Board may require compliance with the positive enforcement program from all current licensees. The proviso in Section 326.110.1, RSMo Supp. 1984, "nothing herein contained shall be construed as conferring upon the board the authority to issue rules or regulations on any subject affecting the practice of public accountancy by a person previously licensed as a certified public accountant unless specifically authorized by the general assembly", was added in 1977. Section 326.055.2, RSMo Supp. 1984, was enacted in 1981. The language of Section 326.055.2, RSMo Supp. 1984, clearly reflects a specific mandate from the legislature and indicates that the Board can require compliance with the peer review program after November 30, 1982. Any rules or regulations relating to the peer review program can therefore be applied prospectively to all licensees.

CONCLUSION

It is our opinion that the Missouri State Board of Accountancy is authorized to commence a positive enforcement program, including the requirement that a licensee submit with the annual registration application samples of financial reports prepared by the licensee.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

ATTORNEY GENERAL OF MISSOURI

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65102

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ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

November 14, 1986

OPINION LETTER NO. 126-86

FILED
126

Mr. John Jacobs
Ozark County Prosecuting Attorney
Post Office Box 278
Gainesville, Missouri 65655

Dear Mr. Jacobs:

This letter is in response to your question asking:

> Is it proper for a County Clerk to release a voter list showing names, dates of birth and addresses of voters to an individual for use for commercial purposes, in this case a person engaged in the insurance business; or does the statute permit distribution of that information only in the context of election activity?

It is our understanding that your opinion request does not refer to whether or not an election authority shall make available voter registration information to any candidates upon request. Instead, it is our understanding that your opinion request relates only to whether or not an election authority shall make available certain voter registration information to an individual for commercial purposes.

House Bills Nos. 1471, 970 & 1021, Eighty-Third General Assembly, Second Regular Session, became effective on August 13, 1986, except with respect to certain provisions which are not relevant here. This legislation repealed certain statutory provisions relating to election procedures and enacted in lieu thereof thirty-seven new sections relating to the same subject.

Section 115.157 as enacted by House Bills Nos. 1471, 970 & 1021 provides as follows:

> The election authority may place all information on any registration cards in computerized form. No election authority shall furnish to any member of the public a tape or printout showing any registration information, except as provided in this section. The election authority shall make available tapes, printouts and mailing labels showing voters' names, dates of birth, addresses, townships or wards, and precincts for a reasonable fee determined by the election authority. The election authority shall also furnish, for a reasonable fee, a printout where available, mailing labels or other record showing the names, dates of birth and addresses of voters within the jurisdiction of the election authority who voted in any specific election, including primary elections, by township, ward or precinct. The election authority that has registration records in computerized form shall have printed in even-numbered years a copy of the voter registration list. One copy of the computerized printout, if available, shall be supplied to all candidates and party committees upon request for a reasonable charge.

It is a well settled rule of statutory construction that when a statute is plain and unambiguous, there is no room for construction and it must be applied by the courts as it was written by the legislature. United Air Lines, Inc. v. State Tax Commission, 377 S.W.2d 444 (Mo. 1964). In this regard, the foregoing statutory provision provides in part that the election authority shall make available tapes, printouts and mailing labels showing voters' names, dates of birth, addresses, townships or wards, and precincts for a reasonable fee determined by the election authority. In addition, the election authority shall furnish, for a reasonable fee, a printout where available, mailing labels or other record showing the names, dates of birth and addresses of voters within the jurisdiction of the election authority who voted in any specific election, including primary elections, by township, ward or precinct.

Therefore, in response to your request, it is our opinion that a county clerk shall make available tapes, printouts and mailing labels showing voters' names, dates of birth, addresses, townships or wards, and precincts for a reasonable fee

determined by the county clerk. In addition, the county clerk shall furnish, for a reasonable fee, a printout where available, mailing labels or other record showing the names, dates of birth and addresses of voters within the jurisdiction of the county clerk who voted in any specific election, including primary elections, by township, ward or precinct. That the individual will use this information for commercial purposes does not affect this conclusion.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

COUNTIES:
COUNTY CLASSIFICATION: Saline County will remain a second class county on January 1, 1987.

December 3, 1986

OPINION NO. 129-86

The Honorable James L. Mathewson
Senator, District 21
State Capitol Building, Room 319
Jefferson City, Missouri 65101

Dear Senator Mathewson:

This opinion is issued in response to your opinion request which states:

> Sections 48.020 and 48.030 detail the conditions and timing of a county's change in classification. Critical to these sections is the determination of what a county's assessed value is. For the purposes of section 48.030, when is the 1985 assessed valuation of Saline County to be determined and what class county will Saline County be on January 1, 1987?

All Missouri counties are classified in accordance with Section 48.020, RSMo Supp. 1984. Those portions of the statute which are relevant to your inquiry provide as follows:

> 48.020. Classification of counties into four classes for the purpose of organization and powers. -- All counties of this state are hereby classified, for the purpose of establishing organization and powers in accordance with the provisions of section 8, article VI, Constitution of Missouri, into four classes determined as follows:
>
> * * *
>
> Class 2. All counties having an assessed valuation of one hundred twenty-five million dollars and less than the assessed valuation necessary for that

> county to be in the first class shall automatically be in the second class after that county has maintained such valuation for the time period required by section 48.030.
>
> Class 3. All counties having an assessed valuation of ten million dollars and less than the assessed valuation necessary for that county to be in the second class shall automatically be in the third class after that county has maintained such valuation for the time period required by section 48.030.
>
> * * *

Section 48.030, RSMo Supp. 1984, describes the circumstances under which a county shall change from one classification to another and prescribes the time when such change shall become effective. It states:

> 48.030. Change in classification, when effective. -- After September 28, 1979, no county shall move from a lower class to a higher class or from a higher class to a lower class until the assessed valuation of the county is such as to place it in the other class for five successive years; but, no second class county shall become a third class county until the assessed valuation of the county is such as to place it in the third class for at least five successive years and until the assessed valuations for calendar year 1985 have been entered on the tax rolls of each county in accordance with subsections 6 and 7 of section 137.115, RSMo. The change from one classification to another shall become effective at the beginning of the county fiscal year following the next general election after the certification by the state equalizing agency for the required number of successive years that the county possesses an assessed valuation placing it in another class. If a general election is held between the date of the certification and the end of the current fiscal year, the change of classification shall not become

> effective until the beginning of the county fiscal year following the next succeeding general election. [Emphasis added.]

The State Tax Commission has certified that the assessed valuation of Saline County was below $125 million for each of the five successive years from 1980 through 1984. The Fortieth Annual Report of the Proceedings and Decisions of the State Tax Commission shows Saline County's 1985 total assessed valuation to be $131,805,601. You have informed us that subsequent to the issuance of the Annual Report by the State Tax Commission, appeals have been resolved such that, if the reduction in assessed valuations because of appeals is considered, the 1985 assessed valuation for Saline County is now below $125 million.

In our Opinion No. 327, Bond, 1972, we stated that the "certification" as such word is used in Section 48.030, is the State Tax Commission report made pursuant to Section 138.440. A copy of this opinion is enclosed. Therefore, the 1985 assessed valuation for Saline County for purposes of Section 48.030 is as shown in the Annual Report referred to above and is above $125 million.

The provision in Section 48.030 which has been emphasized above by underlining was added by the legislature in 1983. We interpret this phrase as precluding a second class county from becoming a third class county if the 1985 assessed valuation exceeds $125 million. Because the 1985 assessed valuation of Saline County is above $125 million for purposes of Section 48.030, we conclude Saline County will remain a second class county on January 1, 1987.

CONCLUSION

Saline County will remain a second class county on January 1, 1987.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

Enclosure:

Opinion No. 327, Bond, 1972

BALLOTS:
CONSTITUTIONAL LAW:
FIRE PROTECTION DISTRICTS:
HANCOCK AMENDMENT:
TAXATION -- TAX RATE:

1. The initial levy of 30 cents per $100 of assessed valuation for a fire protection district must be submitted to the voters as required by Article X, Section 22, of the Missouri Constitution, the Hancock Amendment. 2. The levy question may be submitted to the voters on the same ballot as the incorporation of the fire protection district and the election of the first board of directors. 3. The ballot proposition for the levy may be set forth in general terms such as: Shall the board of directors of the _____ fire protection district be authorized to levy a tax rate of not more than 30 cents per $100 assessed valuation to provide funds for the support of the district?

December 11, 1986

OPINION NO. 133-86

The Honorable Joe McCracken
Representative, District 139
State Capitol Building, Room 114
Jefferson City, Missouri 65101

FILED
133

Dear Representative McCracken:

You recently requested an opinion from this office on behalf of the Polk County Volunteer Fire Association as follows:

> May the same ballot contain the formation of the three-member board and a levy proposal to support the same?

The provisions for fire protection districts are set forth generally in Chapter 321, RSMo. The statutes provide for the formation of the district by a petition in the circuit court praying for the establishment of the fire protection district. After the court determines, following a hearing, that the petition is proper and the allegations of the petition are true, the court enters an order establishing the district and, among other things, setting an election for voters within the district. The circuit court's decree of incorporation of the fire protection district does not become final until it has been submitted to an election of the voters within the district and assented to by a majority of the voters voting on the question.

Chapter 321 establishes a number of levies and we assume for this opinion that your question is directed to the initial

levy of 30 cents per $100 assessed valuation which is authorized by Section 321.240, RSMo Supp. 1984. In answering your request we will address primarily three questions:

1. Must the 30 cent levy be submitted to the voters?

2. If so, may the question be placed on the same ballot as the formation of the district and the election of the three-member board?

3. May the proposition generally authorize up to a 30 cent levy or must it state a specific amount?

The decree of the circuit court must provide for an election to finally incorporate the fire protection district. The requirements of that election are set forth in Section 321.120, RSMo Supp. 1984. That section provides that the decree of the circuit court fix a date for holding the election to vote on the proposition of incorporating the district and to select the three persons to act as the first board of directors. The statute further provides that:

> The question shall be submitted in substantially the following form:
>
> Shall there be incorporated a fire protection district? YES [ ]
> NO [ ]

Section 321.120.2, RSMo Supp. 1984. Section 321.120.3, RSMo Supp. 1984, provides the form of the ballot for the election of a director or directors. Section 321.120 is silent on the submission of any levy to the voters.

The directors of the fire protection district are authorized to levy taxes in Section 321.240. That section provides an initial levy of up to 30 cents per $100 assessed valuation and provides an additional levy not to exceed 10 cents per $100 assessed valuation to be deposited in a special fund used for a pension program. Section 321.240 is silent on the submission of the initial 30 cent levy to the voters. This section does provide a ballot form for the submission of the 10 cent levy for pension programs.

Article X, Section 22, Missouri Constitution, provides in pertinent part:

> (a) Counties and other political subdivisions are hereby prohibited from levying any tax,

> license or fees, . . . without the approval of the required majority of the qualified voters of that county or other political subdivision voting thereon . . ..

Since Section 321.100, RSMo Supp. 1984, provides that the fire protection district "shall be a political subdivision of the state of Missouri" the constitution requires the submission of the levies to the voters of the district.

While it could be argued that the proposition regarding incorporating the fire protection district encompasses an election on the 30 cent levy, it is our view that the cases of Roberts v. McNary, 636 S.W.2d 332 (Mo. banc 1982) and Wenzlaff v. Lawton, 653 S.W.2d 215 (Mo. banc 1983) require a separate proposition regarding the tax levy be submitted to the voters.

Since the levy must be submitted to the voters, we must also be concerned with whether the levy must be submitted as a sum certain or whether it may be submitted in general terms such as "up to 30 cents." This is because the district cannot set a sum certain until after the election of the three-member board. Only the three-member board may set the amount of the levy after determining the amount of money necessary to supply funds for paying the expenses of organization and operation and the costs of acquiring, supplying and maintaining the property, works and equipment of the district and the necessary personnel. Section 321.240, RSMo Supp. 1984. Since the members are elected on the initial ballot, a sum certain would require a later ballot for them to set the amount as required by the statute.

The Hancock Amendment is silent as to the ballot form for the submission of additional taxes, licenses, or fees required by Article X, Section 22. There seems no reason why a proposition submitted to the voters allowing the board to levy a tax up to 30 cents would not comply with Article X, Section 22 of the Missouri Constitution. Our opinion on this matter is strengthened by the fact that the legislature has provided a ballot form in Section 321.241, RSMo Supp. 1985, authorizing an additional levy by the fire protection district of not more than 25 cents on the $100 assessed valuation. The specific ballot form set forth in Section 321.241 reads:

> Shall the Board of Directors of the _____ Fire Protection District be authorized to levy an additional tax of not more than twenty-five cents on the one hundred dollars

> assessed valuation to provide funds for the support of the district?
>
> [ ] FOR THE PROPOSITION
> [ ] AGAINST THE PROPOSITION
>
> (Place an X in the square opposite the one for which you wish to vote.)

It is therefore our conclusion that the submission of the initial 30 cent levy may be done in the same form as that provided in Section 321.241 for the additional 25 cents.

Since it is our conclusion that the levy may be submitted to the voters in a general form, we now consider whether the initial 30 cent levy may by submitted on the same ballot as the incorporation. Section 321.120 does not specifically address this issue. However, 321.120.3 provides that electing the first board of directors or any subsequent board "may be submitted on a separate ballot or on the same ballot which contains any other proposition of the fire protection district".

Section 321.120.4 provides in part:

> If the court enters an order declaring the decree of incorporation to be final and conclusive, it shall at the same time designate the first board of directors of the district who have been elected by the voters voting thereon . . ..

This language taken as a whole seems to require both measures to be submitted at the same election.

Section 321.120.4 further states in the last sentence "the court shall at the same time enter an order of record declaring the result of the election on the proposition, if any, to incur bonded indebtedness." This is the first mention of bonded indebtedness in this section. The board is authorized to incur bonded indebtedness in Section 321.220, RSMo Supp. 1984, which sets forth the powers of the board.

All of these sections taken together lead us to conclude that the legislature intended to include multiple measures on the initial ballot. We conclude the ballot submitting the incorporation of the fire protection district may also include a proposition regarding the 30 cent levy.

CONCLUSION

It is our opinion that:

1. The initial levy of 30 cents per $100 of assessed valuation for a fire protection district must be submitted to the voters as required by Article X, Section 22, of the Missouri Constitution, the Hancock Amendment.

2. The levy question may be submitted to the voters on the same ballot as the incorporation of the fire protection district and the election of the first board of directors.

3. The ballot proposition for the levy may be set forth in general terms such as: Shall the board of directors of the _____ fire protection district be authorized to levy a tax rate of not more than 30 cents per $100 assessed valuation to provide funds for the support of the district?

Very truly yours,

William L. Webster

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